

COMMISSION OF INQUIRY INTO STATE CAPTURE
HELD AT
CITY OF JOHANNESBURG OLD COUNCIL CHAMBER
158 CIVIC BOULEVARD, BRAAMFONTEIN

12 MAY 2021

DAY 393



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TRANSCRIBERS:

B KLINE; Y KLIEM; V FAASEN; D STANIFORTH



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PROCEEDINGS RESUME ON 12 MAY 2021

CHAIRPERSON: Good morning Mr Pretorius, good morning everybody.

ADV PRETORIUS SC: Morning Chair.

CHAIRPERSON: Are you ready? Good morning Dr. Dintwe.

DR DINTWE: Good morning Chair.

CHAIRPERSON: Thank you.

ADV PRETORIUS SC: Dr Dintwe you will have to put the microphone closer to you please.

10 **CHAIRPERSON:** They sometimes complain – witnesses sometimes complain about that chair – the seat. But the problem is that the other one is – seems further from the mic. But try and just make yourself comfortable.

ADV PRETORIUS SC: Is it necessary for the oath to be taken?

CHAIRPERSON: Ja it is. Please just administer the oath or affirmation again.

REGISTRAR: Please state your full names for the record.

DR DINTWE: Setlhomamaru Isaac Dintwe.

20 **REGISTRAR:** Do you have any objection to taking the prescribed oath?

DR DINTWE: No objection.

REGISTRAR: Do you consider the oath binding on your conscience?

DR DINTWE: I do.

REGISTRAR: Do you solemnly swear that the evidence you will give will be the truth; the whole truth and nothing but the truth; if so please raise your right hand and say, so help me God.

DR DINTWE: So help me God.

CHAIRPERSON: Thank you. You may be seated.

ADV PRETORIUS SC: Thank you Chair. Dr Dintwe your statement in affidavit form is before the Chair in Bundle SSA2(b) and it is Exhibit YY15. We ended the last session
10 of your evidence at page 812 the black numbers in the top left hand corner of the pages.

DR DINTWE: I confirm that I can see that.

ADV PRETORIUS SC: You gave evidence before we adjourned in relation to an appointment or the approval of appointment you say without due process by Mr Bongani Bongo and you deal with that in paragraphs 119, 120 and 121 of that page.

You informed me just before commencement of your evidence today that there was an issue that you wish to
20 clarify.

DR DINTWE: That is correct Chair.

ADV PRETORIUS SC: Please so so.

DR DINTWE: Yes Honourable Chair I am not amending what I would have written there but I could have created an impression that the Minister accepted our findings and

recommendations readily – at first instance.

But I have since checked my records again there was something – some other correspondence that I would have omitted and I think that the commission – The Chair will appreciate that I am sitting with about 200 complicit and given time so those mistakes do happen. But it does not really change the whole complexion of what I would have written in my affidavit.

I however request your permission that I read
10 something here so that I clarify that once step that I say that I would have jumped.

CHAIRPERSON: That is fine.

DR DINTWE: Thank you very much. And may I continue?
So we – we have written to the Minister with the findings and recommendations but she then wrote to us and although she was not saying that the appointment was regular she raised about three points and we accepted them as includes because when you are doing investigations you want to also give them an opportunity to input into that investigation. So
20 we accepted that but the following points were raised in her letter and this was on the 27th of February 2020 where she said that:

“From the report it appears as though the former Minister of State Security Mr B Bongo and the former Director General of State

Security Agency SSA Mr A Fraser were not interviewed with the aim of ensuring that the other version is heard. It is difficult for me to reach a logical conclusion without information from these two critical role players on this matter.”

And then she further concluded in that letter – in her letter and I quote – open quotes

10 “It will be prudent to guard against a culture that erodes the integrity of the organisation and opens up such issues once the political principle has left.”

So the investigators then decided to explain those matters and the reasons obviously why we did. And the following reasons were sent to the Minister and these are not direct quotations but they will be in my report – in the – if you – if you like the report after the inclusion of – of her inputs.

We said that there was no need for us to have interviewed he former Director General Mr A Fraser in light of the fact of
20 that Mr Fraser as the Accounting Officer of the SSA then was excluded in the submission to appoint the aforesaid member to the position aforesaid.

So you will have a number of signatories and Mr Fraser was not in fact one of those entries.

The second reason that we 00:06:13

was that in – “We are in possession of the approved submission wherein the member concerned was appointed to the aforesaid post of 00:06:25 Manager within NICOC the National Intelligence Coordinating Committee. The approved submission as an official document under the custody of the State Security Agency constitutes prima facia proof of the appointment of the said member by the then Minister Advocate Bongani Bongo MP as contemplated in Section 8 (2) of the Intelligence Services Act 65 of 2002.”

10

The third reason:

“It was clear on the face of the submission aforesaid that the appointment of the member concerned by the then Minister of State Security Advocate Bongani Bongo was done in total disregard of the applicable laws and regulations.”

20

And then finally we said:

“The affidavit by a member of the SSA who implemented the approved submission confirmed that the member concerned was appointed as a result of their aforesaid

submission as approved by Advocate Bongani Bongo MP in his then capacity as the Minister of State Security. It was indicted to the Minister that with the evidence collected thus far by us it was clear that the appointment of the member concerned was irregular and unlawful. No useful purpose was going to be served by approaching the former Minister and
 10 interview – interview him.”

And then we sent that particular letter. Now this is a significant point since then the Minister has never reverted back to us.

ADV PRETORIUS SC: Alright. Just to summarise then you gave evidence last time of an appointment which was called into question by your office.

DR DINTWE: That is correct Chair.

ADV PRETORIUS SC: As being irregular.

DR DINTWE: That is correct.

20 **ADV PRETORIUS SC:** You conducted an investigation and made certain recommendations.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: The Minister – Minister Dlodlo raised what appeared to be procedural concerns about who had been heard and who had not been heard.

DR DINTWE: That is correct.

ADV PRETORIUS SC: You responded to those complaints maintained your recommendation and the matter was from your point of view not resolved.

DR DINTWE: That is correct to date.

ADV PRETORIUS SC: If we could go over the page then please to page 813. You deal in the paragraphs on that page and over the page with appointments to the cadet program and to other portions or departments within State
10 Security. Page – paragraph 122 just very briefly what happened in relation to those appointments there or recommendations.

DR DINTWE: It is a generally accepted practice amongst intelligence services that sometimes they will want to identify intelligence officers at an early stage. They could visit high schools, they could go to the universities and start recruiting there. And what they have done here is that in certain instances they will identify the so called underprivileged or previously disadvantaged students or
20 individuals they will give them a bursary and then they will go and study with already a commitment at that stage the they will be absorbed into the agency once they complete that.

Same principle with the cadet program as well. So they have done a lot on that. Like a single cadet program

could have around thirty or even more students who will be taken to the college. We would not have a problem of that it is a good practice accepted.

The only problem is that they do not have a criteria which says what are the requirements basic or otherwise that these cadets or students should you know comply with and that is creating a serious problem because there is evidence even in the high level 00:10:57 panel which concludes that the SSA has been turned into an employment
10 agency for the politically connected as well as those who are connected to the senior managers within the State Security Agency. And we cannot question that as an oversight because the things that we should be doing is to say what is the criteria and check really whether that criteria and the procedures were followed when recruiting those people.

ADV PRETORIUS SC: Alright you have given me examples in paragraphs 122 to 124 and the facts are set out there but in principle what is wrong if a Minister of State Security
20 suggests a particular candidate for a cadet program with the undertaking that that person will then employed by SSA? Surely a Minister can identify a person suitable for such appointment on his or her own? What is – what is the problem with this Ministerial overreach as you call it?

DR DINTWE: The problem is that more often than not we

have stumbled across or in fact we found that there would familial relations between people who are appointed between them and the political principles and in certain instances also with senior managers within the State Security Agency.

ADV PRETORIUS SC: Alright. What about – yes you do not mention...

DR DINTWE: For us it is nepotism and – and we cannot really deal with that issue satisfactorily until we know which
10 criteria was used to identify that.

ADV PRETORIUS SC: Alright. So that – the danger of nepotism you do mention as a general point but the – in paragraph 122 you do say there are other instances of the children and family members of senior politicians and Ministers being appointed to these cadet positions. You do mention that. But the particular examples you give here are not examples of nepotism.

DR DINTWE: They are examples of nepotism. We decided to – to remove about two names.

20 **ADV PRETORIUS SC:** Oh I see.

DR DINTWE: For the reasons of the time – the pressures of time Chairperson and we are also trying to limit the notices that would have sent. But in the – in the documents that will be declassified and transmitted to yourself you will see the names, the surnames and that relationship.

ADV PRETORIUS SC: I am – I understand what you are saying.

CHAIRPERSON: So – so we would – so we will get that information.

DR DINTWE: It is in the documents that I have submitted to the commission already.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: Alright. The second point is what is the – what are the issues around the future loyalty of the
10 SSA member a cadet becomes a SSA operative about the potential of partial loyalty to the person influential in his or her appointment, is that a problem?

DR DINTWE: That is a problem and I think I would have raised it earlier as well to say that they become beholden to the appointing authorities and they are ingratiated in a particular manner because some of them will tell you that I did not expect this you know. Just imagine how easy it is Chairperson if I get identified I am given a bursary, I get appointed but our neighbours child who may even be more
20 qualified than myself is not getting considered for that position. It is obvious that I will be beholden to the appointing authority.

ADV PRETORIUS SC: And then in addition to that you have testified to the Chair that you are not clear whether the requirements – the appointment requirements were actually

followed in each case.

DR DINTWE: That is correct. We would not be able to establish that because each time we request the assist – the criteria they say we do not have the criteria.

CHAIRPERSON: But how rife is this problem of appointments that are done in this way particularly those that seem to have features of nepotism roughly do have some idea? Are we talking about two, three okay in instances are we in a year are we talking about over the
10 past five years fifty people more or less. Do you have some idea or is that difficult to say?

DR DINTWE: It is frequent practice Chairperson. In fact when I was driving – drafting the affidavit and I wanted that documentary proof I was given a list of about forty.

CHAIRPERSON: Forty.

DR DINTWE: Cadets yes.

CHAIRPERSON: Yes, yes.

DR DINTWE: And – and at that particular point I am informed reliably that the then Minister of State Security
20 Minister Kasrils I am not implicating him so I think I can mention the name he actually disowned those students because he said that when he was going through the list he could pin point exactly that Minister, that other former Minister, that other Minister.

CHAIRPERSON: Is that so.

DR DINTWE: That other DG, that Deputy.

CHAIRPERSON: Yes.

DR DINTWE: DG.

CHAIRPERSON: Yes.

DR DINTWE: So he disowned about forty graduates on a cadet or a cadet program. The other ones it was actually two students who had gone to university but then the reason why I focused on that it is because they would have written to us now complaining in turn. But there were not placed on
10 a level that they were promised before they went to university. It is a very, very, very frequent you know issue at the Security – the State Security Agency.

CHAIRPERSON: Do you have an idea as to whether there is a number that they seek – or a target that they seek to achieve per year that they must have got X number of people that will go into this training and then later on get employed by SSA?

DR DINTWE: I do not remember I think that we – we made that enquiry but it should have been included in that annual
20 report.

CHAIRPERSON: Yes.

DR DINTWE: If not they are planned.

CHAIRPERSON: Yes.

DR DINTWE: For the so called 00:18:08 ATT.

CHAIRPERSON: Yes.

DR DINTWE: But we could not get kind of information so I do not know in any given year how many people are they targeting to recruit.

CHAIRPERSON: Because it would be good to have an idea whether one can say over the past five years or even more it looks like on average per year so many people get put into the program even if to the training with a view to later being employed by SSA – even if not all of them are people who have been employed due to nepotism but people go
10 into that program to see its size.

DR DINTWE: Ja I will not be – I will not have any intelligence – intelligent you know response to that.

CHAIRPERSON: No, no that is fine.

DR DINTWE: I – work that out.

CHAIRPERSON: It can be furnished later in writing if – if it is information that you can get.

DR DINTWE: Maybe safe to indicate that it is also happening loosely in that ...

CHAIRPERSON: It is not (talking over one another).

20 **DR DINTWE:** In that you will get and I write – I write the names of the Ministers you will get Minister David Masobo who will visit a particular high school in KZN and then he identifies maybe three or four students. You will get the then Deputy Minister I mentioned her name Ms Molekane who will go to a high school in – and I am exchanging

provinces here to the North West and identify two that we have that particular information. And then you will have the Director General then who will have a program of about thirty or forty at any given time them being sent on this cadet current program. So it has happened because there is no criteria. Other people are going and where we are sitting now we may even be oblivious to some of those cases.

CHAIRPERSON: Okay. Mr Pretorius.

- 10 **ADV PRETORIUS SC:** Just in summary then as a matter of principle at the bottom of page – or at the end of paragraph 123 on page 813 you say:

“This involvement of the Ministry and the recruitment process constitutes significant executive overreach into the functioning of the SSA.”

And as I understand it you have raised at least three problems one is question mark around proper qualification.

DR DINTWE: That is correct.

- 20 **ADV PRETORIUS SC:** And adequate suitability of the candidate for the post being properly assessed. The second is that there would a potential of the relationship between the state official or the Minister and the operative being exploited. I suppose both ways is it possible that the operative would be loyal then to the Minister and the

Minister could exercise influence over the operative. Is that a valid observation that you make?

DR DINTWE: It is an observation that we – we confirm and – and maybe can I give a final example of what happened in terms of the executive overreach? And this is the matter that we are dealing with – with now.

Now the specifications starts writing a submission and that submission appoints 26 managers – now it is senior managers they use their own levels there but I think
10 that in the public service it would be your directors and – because they are also general managers who could be equivalent to chief directors and so forth.

Now this is the chase that is confirmed but what happens there is that they did not advertise it. There is no selection panel. There are no interviews. Some of those people do not meet the requirements of that particular post. The DDG – I mean the DG the acting DG that even refused to recommend because he is writing his concerns about how these people were identified. 26 Chairperson managers and
20 the only thing that you find in that submission is that they have a blog where they write their motivation.

One example of that motivation is that this person used to act in the particular position and he is a loyal member for years and he has experience on that particular field and so forth. And then they got appointed. Some of

them and what the DG wrote under the comments is that some of them were even recalled from retirement and then they were appointed – appointed – appointed again.

There is no regulatory framework. When you go through that particular submission they did not tell you about this any legislation which empowers the 00:22:28 but it is the Minister who then appoints this group of 26.

As I am talking to you they are in their positions.

CHAIRPERSON: So – so are you saying that there is no
10 legislation or regulation that gives power to anybody whether it is Minister or DG to say this can be done?

DR DINTWE: The way I see it Honourable Chairperson sorry – ja the way I see it, it is that the Minister was intending to come up with what we called a deviation. So the regulations are in place and they could not code those regulations because regulations says you advertise, you come up with a selection criteria, selection panel and then you follow those steps.

That is what their own regulations are saying. So –
20 so they did not write any of those there. The only reason that they provided under the motivation is that there is a huge number of managers who have either resigned, went on retirement.

In fact coming up with what one could see as an emergency recruitment. So in my career I have only heard

about emergency procurement when there is a burst pipe somewhere and so forth.

But I have never ever heard of an emergency recruitment.

CHAIRPERSON: The – the legislative provisions that you have in mind about the advertising and so on I think those would relate to the actual appointment of these people. Is it not?

DR DINTWE: That is correct Chairperson.

10 **CHAIRPERSON:** Yes. What I was more concerned about is how they come in because based on your evidence it is like they first have to get into some training or they get bursaries on the basis that once you have got whatever the qualification or training is you will be employed. So I was asking about any legislative provisions relating to the granting of those bursaries or whatever the program is. Do you know anything?

DR DINTWE: Ja no in that case they do not have and I will request the Chairperson to delineate the two that I was
20 talking about.

CHAIRPERSON: Okay.

DR DINTWE: The latest example that I was referring to is people who are long in the service.

CHAIRPERSON: Oh.

DR DINTWE: Now that are appointed into management

positions.

CHAIRPERSON: Okay, okay.

DR DINTWE: I had exhausted...

CHAIRPERSON: Oh you had exhausted the earlier one.

DR DINTWE: At least (talking over one another) time – there is cadets and the students.

CHAIRPERSON: Oh okay. But the cadets get bursaries to get some training or whatever and then they get employed afterwards, is that right?

10 **DR DINTWE:** That is correct Chairperson.

CHAIRPERSON: Ja. So – okay that is where I was still on – and you say that one has got no legislative provisions – framework as far as you know?

DR DINTWE: It does not have and that is what we have been requesting.

CHAIRPERSON: Yes.

DR DINTWE: Even if it is a policy which this was the criteria.

CHAIRPERSON: Yes.

20 **DR DINTWE:** To be considered.

CHAIRPERSON: They do not have?

DR DINTWE: They do not have that Chairperson.

CHAIRPERSON: Yes. So it is like somebody just decides it is a good thing to look around and give bursaries sometimes to people who seem to be deserving and then it is done.

DR DINTWE: That is correct Chairperson.

CHAIRPERSON: Yes. Okay but the latter category you were talking about is people who have been in the system but not in certain positions and then they are promoted to certain positions without following any processes.

DR DINTWE: That is correct.

CHAIRPERSON: Okay.

DR DINTWE: And in that instance there are regulations.

CHAIRPERSON: Ja there are...

10 **DR DINTWE:** Which deals with that but they get ignored.

CHAIRPERSON: Yes.

DR DINTWE: Completely.

CHAIRPERSON: Yes. Yes. And in regard to that both Ministers and DG's are involved as well in the breach of those regulations?

DR DINTWE: In the latter example.

CHAIRPERSON: Ja.

DR DINTWE: The acting DG refused to recommend.

CHAIRPERSON: Yes.

20 **DR DINTWE:** But the Minister went ahead and approved.

CHAIRPERSON: Yes.

DR DINTWE: The appointment. As I am talking to you those people are in those positions.

CHAIRPERSON: And that is about how many people?

DR DINTWE: 26.

CHAIRPERSON: 26.

DR DINTWE: Managers.

CHAIRPERSON: And which Minister are we talking about do you know?

DR DINTWE: Minister Ayanda Dlodlo.

CHAIRPERSON: Yes and how recent is that that appointment are – or how recent are they?

DR DINTWE: They are yet to get their 00:28:11 salary Chairperson.

10 **CHAIRPERSON:** So it is something that happened after this commission had heard some evidence about some of the challenges in SSA.

DR DINTWE: That is correct Chairperson.

CHAIRPERSON: Yes.

DR DINTWE: Yes.

CHAIRPERSON: Okay alright. Mr Pretorius. I am sorry – I am sorry Mr Pretorius. Have you got any understanding with regard to this category – have you got any understanding why Ministers and DG's would act in breach
20 of the regulations in regard to these appointments when they know them. Do you know why they would be doing this?

DR DINTWE: I do not want to give you conspiracy theories.

CHAIRPERSON: Ja. Okay. Alright.

DR DINTWE: I did not want to give you that.

CHAIRPERSON: Okay.

DR DINTWE: Chairperson.

CHAIRPERSON: Okay. Because the – it cannot be that they do not know I would imagine. They must be – know the regulations. You do not want to say anything.

DR DINTWE: Alright. And I – I think with one of those appointments there was a media opinion. There was an opinion in the media. Those people are connected majority of them are connected to the previous management. The
10 management that would have worked with Mr Arthur Fraser during that time. People are able to appoint and – and there is a belief that they are coming back and 00:29:54 in the State Security Agency. Yes.

CHAIRPERSON: Okay. Mr Pretorius.

ADV PRETORIUS SC: The period that you are referring to, is that the period covered by the PAN 1 Report, Principal Hedge and Network 1 Report, that period?

DR DINTWE: During that period. That is correct, yes.

ADV PRETORIUS SC: Alright. And the allegation - and it
20 is an allegation for the moment, we may deal with that later, Chair - is that people who were implicated in the PAN 1 Report were reappointed to the SSA.

DR DINTWE: That is correct.

ADV PRETORIUS SC: Is that what ...[intervenes]

DR DINTWE: Maybe we should not call it the

reappointment. We should ...[intervenes]

CHAIRPERSON: Promotion.

DR DINTWE: ...talk about promotion.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: I see.

DR DINTWE: So during Pan 1, they would have been in a level below, the level that are pointed to now.

ADV PRETORIUS SC: Alright. So it is promotion you are talking about?

10 **DR DINTWE:** That is correct, Chairperson.

ADV PRETORIUS SC: Just to summarise then. The Cadet Programme, the Bursary Programme has its outcome appointment into the ranks of the SSA. Correct?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And you have given examples of ministerial involvement in the selection and appointment informally, of course, into that programme.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And your concern is that the proper
20 procedures are bypassed in that process.

DR DINTWE: That is correct.

ADV PRETORIUS SC: In relation to the 26, you speak about irregular promotions to senior positions within the SSA.

DR DINTWE: I confirm that, Chairperson.

ADV PRETORIUS SC: But all these are done under the direction rather than the recommendation of the minister, as I understand what you are saying.

DR DINTWE: The approval of the minister. So the minister is the last signatory and it will be written, like, on the submission to say that recommend, not recommend that. So it will be the other signatories. You will get an HR official somewhere but the last part there it is approved or not approved. And the minister - the appointments
10 happened under the approval of the minister.

ADV PRETORIUS SC: What is wrong with that?

DR DINTWE: Exactly what I am saying that involvement of the minister in the recruitment process constitutes significant executive overreach and this is not – cannot not be seen as my opinion only because it is also contained in the HLRP.

ADV PRETORIUS SC: So, as I understand it, the minister does not approve finally but is involved in the process leading up to his or her approval, irregularly?

20 **DR DINTWE:** That is correct. Yes, Chair.

ADV PRETORIUS SC: In paragraph 124, page 813 you record an interesting observation. You say:

“This was also the case in the Free State Provincial Office of Crime Intelligence where the Provincial Head, Major General Makele has

acknowledge this practise.

According to her the appointment, the appointment of children and family members of senior police officials, as well as, a girlfriend to one her brigadiers assisted in ensuring that they recruited trustworthy people.

These members were then placed in a very sensitive environment without the necessary experience to the detriment of Crime Intelligence...”

10

Leave aside the former qualification issue which you raised in the second sentence but are you then aware of the statement actually being made that family members are appointed because they are trustworthy?

DR DINTWE: And I am still shocked, even today, Chairperson. But what happened is that when my staff members go and do what we can call, like, verification, like, when they visit these offices, I, sometimes I accompany them and we will deal with or we will have a meeting on the first day and then I will leave them because sometimes they will work there for a week or so.

20

So in this specific meeting I was sitting there with the Provincial Head, Major General Makele, and I posed that question. It was from myself to say: But we are informed by somebody in that meeting... In fact, a

component - responsible for Counterintelligence because Counterintelligence in the SAPS will investigate the other officials with intelligence(?) agents. And I was shocked to her response to that and that is the reason that was given to myself.

Because the names – the names were mentioned and next to each name it will be a station commander of that station, police station in Bloemfontein – the Bloemfontein area. It will be a major general somewhere
 10 in the provincial office. It will be a brigadier in the same office whose girlfriend is appointed in that space. And then you will also have a relative of Advocate Mapele(?) herself.

And the reason what – and the reason that she provided to us was to say that these children or these kids are well-bred. Well-bred up. Because they belong – they are children to senior officials of SAPS and so forth. And that was the reason that was provided to us. I am still in disbelief even today that that was the reason used.

20 **ADV PRETORIUS SC:** Right. You go on in that paragraph to say:

“There has also been a complaint that because they... [and I presume it these appointees] ...owed an allegation to the provincial head.

They only share the intelligence that they

gather with those members of management to whom they owe allegiance...”

Is that a complaint you received.

DR DINTWE: That is the complaint that I received. May I please paint a this by using an alphabet, if you will allow me Chairperson. Now you will have A and A is a head of Counterintelligence. And then you will have B who is a head of Surveillance. Now because this group falls under this other group of B, for instance, they will then provide
10 information only to B so that B could appear more successful than A.

So they will be sitting there, and I am just being careful because this is one of the networks that they are doing but let me use a similar or simplistic example. Let us say they are responsible for listening to conversations and they come across, for instance, people who are blaming to commit cash-in-in-transit heist, for instance.

Instead of giving that information to A, they will not do that but they would rather give it to B because B
20 was on their side and would have influenced their appointment. So that kind of a competition also exists and which poses a serious problem then because it means that the other people may not even come across that information.

ADV PRETORIUS SC: So do I understand you correctly to

be saying that one of the principles of employment in State Security particularly, and I presume it applies throughout the public service, is that the person appointed must be completely independent of external influence?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Particularly influence in regard to their appointment in the first place?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: You go on in the next section,
 10 paragraph 125 and following, to deal with the controls relating to the use and flow of money in the Intelligence Services. Now we have heard detailed evidence in this regard. You give evidence of a more general nature arising out of your own experience and independent investigations. What have been your findings? You deal with that in paragraph 125 and following.

DR DINTWE: Yes. And Chairperson, yes, I think that I need to stand by confirming that indeed we would have removed specific transactions because amongst your
 20 witnesses I think that Ms K detailed all those. We do have also a detailed list of money-flows. What I can confirm is that money has been stolen and we are talking lots and lots of money taken with suitcases, others being lost and people were never really held accountable for that money.

And what I am saying there is that our findings

are that these monies have been used for other things that, in fact, could affect our National Security adversely. For an example, some of those monies could be used to fuel political tensions. There is evidence in our possession that some of those monies were used to finance a particular faction within in the governing party and in other jurisdiction you will find that these monies can be used also to finance terrorism.

ADV PRETORIUS SC: Right. In paragraph 126 you go
 10 into a little more detail. Would you deal with that? But before you do. The documents that you are yet to provide in the various bundles supporting your statement, do they contain more evidence of this?

DR DINTWE: They do contain itemised, Chairperson. Itemised, you know... Ja, the items which indicate at what stage was this amount taken and what reason was given, and I even attached examples of what could be seen an invoice. In other words, reporting that the recipient would have received the money.

20 **ADV PRETORIUS SC:** Alright. So that documentation, we trust, will be forthcoming hopefully as soon as possible Dr Dintwe.

DR DINTWE: That is correct. I confirm that.

ADV PRETORIUS SC: Yes. Paragraph 126, you go into a little more detail.

DR DINTWE: Yes. And I also referred them to that. I think... Okay. I am aware, Chairperson, that during the evidence of Ms K you were shown an example of a Word document. So I take the money and say that I am taking this money to Josef. Josef could be a source or he could have done certain work for us. And what I do is that I only type. I, the undersigned, confirm that I have received this particular money. And then there is just a signature. No letterhead, no nothing and so forth and they are taking
10 huge amounts of money. One of the transactions was equivalent to 200 000 Euros at a call(?).

ADV PRETORIUS SC: Alright.

CHAIRPERSON: Who is quick to work out how much that is in – is it multiplied by eight or ten? To turn it into – convert it Euros.

ADV PRETORIUS SC: Nineteen, I think.

DR DINTWE: Even eighteen. It is eighteen.

CHAIRPERSON: Oh, okay.

DR DINTWE: It is around eighteen.

20 **CHAIRPERSON:** I have not travelled in a long time.
[laughs]

ADV PRETORIUS SC: [laughs]

DR DINTWE: It runs into millions.

CHAIRPERSON: It is roughly?

DR DINTWE: It runs into millions.

CHAIRPERSON: Millions.

DR DINTWE: At that time that I was doing that calculation.

CHAIRPERSON: Ja.

DR DINTWE: To be – what I find at that particular point. I know it is fluctuating but it was R 2.7 million.

CHAIRPERSON: H'm.

DR DINTWE: Yes. That was taken by a member and it just got lost, just like that.

10 **CHAIRPERSON:** H'm. And there is no proof of what it was used for?

DR DINTWE: Not at all, Chairperson.

CHAIRPERSON: H'm.

ADV PRETORIUS SC: Alright. You are saying, firstly, that the use of cash is inherently problematic, although it might be necessary, I think, that has been conceded by you elsewhere, but it is the accounting and the documentary records in relation to the disbursements of cash that is of concern. Is that correct?

20 **DR DINTWE:** That is correct. And also to add that managers deliberately or being unaware attempt to misconstrue secrecy and allow the commission to use cash, to mean that then it is no accountability. There must be an authority somewhere where you go and account. So they see that kind of a thing to say that once you say that

you can use cash, then it means that you can – you may not, in fact, account it for and that is what is happening.

CHAIRPERSON: So it is a tap that must be closed without jeopardising the effectiveness of intelligence, proper intelligence and the use of cash legitimately for intelligence purpose but close the tap for those who can just take money and they do not have to account to anybody as to whether that money was used properly.

DR DINTWE: That is correct, Chairperson but they will
10 never ever be able. None – all intelligence service will need to use cash in certain instances.

CHAIRPERSON: No, no I ...[intervenes]

DR DINTWE: [Indistinct]

CHAIRPERSON: ...the legitimate part of using cash, that must continue. The problem is to close the tap of using it illegitimately.

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: Ja. Because one can understand why cash may have to be used for legitimate intelligence
20 purposes but one must close the tap if one can in regard to people being able to just take money and go and use it for whatever they choose to use it for and say it was for intelligence purposes and their word must be accepted.

DR DINTWE: That is correct. That is our proposition, Chairperson.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: We will deal an extract from one of the reports you actually made in this regard over the page but for the moment if we could stay on paragraph 126. You say you raised concerns about the prevalence of large sums of cash being withdrawn at the SSA and that is in relation to the 2016/2017 Financial Year of SSA Operations.

And you say:

10 “This concern was raised following claims that large sums of cash were being carried out of the SSA by members sent by senior management of the SSA to various destination between 2014 to around 2017 with limited proof of receipt of those monies by persons at the purported destinations...”

Are those the claims that were made to you and your office?

DR DINTWE: Yes but we would have investigated them.

20 So what we include in our certificates. Remember – that I referred to last time.

ADV PRETORIUS SC: [Indistinct]

DR DINTWE: Yes. It will basically be findings not value(?). So we would have received a report and we would get into the system and check whether all that

money indeed went out and we will check whether there was some kind of invoice or settlement of that particular money.

ADV PRETORIUS SC: Alright.

DR DINTWE: So what I list in the certificate will be our findings to say that this X amount of money went outside and we do not have proof that it was really received by the intended recipient.

ADV PRETORIUS SC: Right. Now these claims that were
10 made - complaints that were raised with your office. You say you investigated and you made findings.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And those findings highlighted concerns over the use of cash and the improper or inadequate accounting for that cash.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Now you say that you raised these issues in certificates. Who receives your certificates?

DR DINTWE: First it would be the minister responsible for
20 that particular service. In other words, Minister Bheki Cele will get on behalf of the police of SAP-CI. Minister Nosiviwe Mapisa-Nqakula will get on behalf Defence Intelligence, and Minister Ayanda Dlodlo will get on behalf to the State Security Agency. That is the first authority.

The second authority will be the Head of

Services. So it will be the DG and the Divisional Head's Commissioner. In the case of SAP-CI, it will be Chief Defence Intelligence Officer in that right(?) chain(?). The third authority will be the Joint Standing Committee on Intelligence.

ADV PRETORIUS SC: Now in regard to the latter. Without the intervention of the minister or the director general or acting director general, as the case may be, in each security establishment, there is a direct reporting
10 between your own office and the Joint Standing Committee of Intelligence. Do I understand that correctly?

DR DINTWE: You understand me correctly.

ADV PRETORIUS SC: What did the JSCI do on receipt of these certificates in relation to the improper use of cash, as you found?

DR DINTWE: The previous committee never acted. Never acted on this.

ADV PRETORIUS SC: Do you know why?

DR DINTWE: The one or the other reason that was
20 provided at a particular point was that they want to really achieve(?) the separation of powers. For them they saw these as the decisions which happened with them, the executive realm. And I do not know to what extent they were intended to hold those executives, you know, to account but as far as I know is that I was never really

provided a reason, a convincing reason. Let me say that. I was never convinced as to the reason why they could not act.

ADV PRETORIUS SC: You conduct in your office an oversight role over the executives, correct?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And you do so independently.

DR DINTWE: That is correct.

ADV PRETORIUS SC: With your knowledge of what
10 oversight entails, are you satisfied that the JSCI performed its functions adequately?

DR DINTWE: No, not – I can say and submit to the Chairperson that no they – that is not sufficient their oversight role.

CHAIRPERSON: I thought you were tempted to say I can say without fear of contradiction that they are not doing their job. [laughs]

ADV PRETORIUS SC: [laughs]

DR DINTWE: No, Chairperson I can say confidently
20 ...[intervenes]

CHAIRPERSON: Ja.

DR DINTWE: ...that their oversight was never adequate.

CHAIRPERSON: H'm.

DR DINTWE: The reason why I say I am confident about it is that it is also a finding of the HLRT(?) ...[intervenes]

CHAIRPERSON: Yes.

DR DINTWE: But I think that there is evidence before this Commission, as it were ...[intervenes]

CHAIRPERSON: Yes, yes.

DR DINTWE: ...to say that Parliamentary oversight was not adequate.

CHAIRPERSON: Now with regard to this particular committee. Are you basing your view on your experience during your term of office only or are you only basing your
10 view on records or lack of records that you found in your office as to interactions between your predecessors and this particular committee or what is the position?

DR DINTWE: My preference was to confine this to my term of office.

CHAIRPERSON: Yes.

DR DINTWE: Because I think that even officials(?) will tell you that it is I have been there for a sufficient time to then be able to formulate an opinion.

CHAIRPERSON: Yes.

20 **DR DINTWE:** But also formulate or identify a particular pattern.

CHAIRPERSON: Yes.

DR DINTWE: So, I mean, I have been there now for four years ...[intervenes]

CHAIRPERSON: Yes, that is a long time.

DR DINTWE: So I confined myself to my – office.

CHAIRPERSON: Ja. By the way, who was your predecessor?

DR DINTWE: My predecessor was Advocate Faith Radebe, the late.

CHAIRPERSON: Oh, she is late?

DR DINTWE: Yes.

CHAIRPERSON: So she would have been there, from what? Around 2010? Is it a five year term?

10 **DR DINTWE:** Yes, I am writing about – it is a five year term.

CHAIRPERSON: Ja.

DR DINTWE: Ja.

CHAIRPERSON: Then there was the space of two years when there was nobody.

DR DINTWE: That is correct.

CHAIRPERSON: Before your time. Before you were appointed.

DR DINTWE: That is correct.

20 **CHAIRPERSON:** Yes.

DR DINTWE: I think in my earlier paragraph here, I have written which years exactly.

CHAIRPERSON: Yes, yes.

DR DINTWE: But 2010 sounds more probable.

CHAIRPERSON: Yes, yes. Now if – I am trying to find out

how one can find out even without asking the committee, find out as to what may have been sent to the Portfolio Committee by, for example, Ms Radebe and what responses, if any, she may have received in response to her reports. What did you call them? What do you call your reports?

DR DINTWE: Certificates.

CHAIRPERSON: Certificates in regard to her certificates. So in your office, you would have copies of certificates that
10 she would have sent during her time. Is that right?

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: But in terms of the mechanisms, you do not have a way of knowing whether the committee acting upon each certificate, do you?

DR DINTWE: No, but I will know ...[intervenes]

CHAIRPERSON: Ja.

DR DINTWE: ...by implication.

CHAIRPERSON: Yes.

DR DINTWE: Because there is continuance in the office.

20 **CHAIRPERSON**: Yes.

DR DINTWE: It is only the Inspector General of Intelligence who gets appointed who comes and go.

CHAIRPERSON: Yes.

DR DINTWE: The rest of the staff and very senior people including investigators are always there.

CHAIRPERSON: Yes, yes.

DR DINTWE: Now during my first year in the office and when I started dealing with my first certificate there was reference made or recommendations that remained unimplemented and were coming from the tenure of Advocate Faith Radebe.

CHAIRPERSON: H'm.

DR DINTWE: There are many examples. Examples of that. In fact, the so-called Rogue Unit at SARS and so
10 forth. I still had to deal with that issue after I have taken occupancy of that office. So I will have a group of certificates which will show what my predecessor sent to the committee but those problems would still be applicable under my term of office.

CHAIRPERSON: Yes.

DR DINTWE: Like, for instance, the one that I am writing there. Inadequate controls relating to the use and flow of money in the Intelligence Services. You will find those things also under the certificates that were drafted or that
20 were signed before I assumed the office.

CHAIRPERSON: Well, I think this is how we can deal with it and maybe you deal with it in your affidavit. Maybe we have dealt with it last time. Mr Pretorius will remember. Or maybe it is still to come amongst the documents that you will send. I think it would be good if you were able to

say I have looked at the certificates that were sent by my predecessor from that year up to that year. I am aware of what she recommended or whatever.

What issues she raised before the committee to look at or deal with as well as the ministers, the relevant minister because you have said that the certificates go to the relevant ministers, the relevant DG and the committee. You – so if you could identify those for each year and be able to say the following – the problem – this problem that
 10 was raised during that year is still there or when I arrived it was still there.

So I can tell that nothing has been done to deal with it properly. So or whatever had been done has not worked. You know. And so I think that could help just to give that indication. In terms of law, there is nothing that requires the committee or the relevant ministers and DG's to revert to your office to say you raise these issues. This is how – this is what I have done in response.

DR DINTWE: I think my submission, Chairperson, was to
 20 say that our recommendations are just being ignored willy-nilly.

CHAIRPERSON: Yes.

DR DINTWE: And we touched on the PAN 1 Investigation. If I can make the specific example. And I am using this example to submit to the Commission that it is doable. It

is an exercise that I think that if I go back to the office I can readily ...[intervenes]

CHAIRPERSON: You can do that, ja.

DR DINTWE: ...identify so say that...[intervenes]

CHAIRPERSON: Ja.

DR DINTWE: ...this has been a problem for time ...[intervenes]

CHAIRPERSON: Ja, ja.

DR DINTWE: Or since the establishment of this particular
10 office.

CHAIRPERSON: Yes, yes.

DR DINTWE: Let us take an example of what one of my staff members would be writing an affidavit about that I discussed and I think it is in here. Now, the former Minister Mahlobo says that he was not aware that Mr Arthur Fraser was implicated in the PAN Investigation. And I went to the office because the Commission wanted us to confirm whether there were some presentations made to the minister with regard to the PAN Investigation.

20 So the same recommendations in the PAN Investigation was that people should be judged(?), for instance. So that is exactly what – it is a classic example and I think an accurate example of saying or being able to furnish(?) the Commission that it is a doable exercise to go there and say that these were the findings before even my

occupancy of the office and they were never ever implemented.

CHAIRPERSON: Yes.

DR DINTWE: In law, I do not think that ...[indistinct]

CHAIRPERSON: Yes.

DR DINTWE: ...therefore ask as – in terms of oversight body.

CHAIRPERSON: Yes, yes. Well, of course, I think you suggested the last time or you do in your statement that I
10 think you wish for a regime in terms of which your recommendations cannot just be ignored but they would be binding. I got the impression you had in mind the same situation as the Public Protector but I may be misrepresenting what you say but certainly the minimum, it would seem, is that those authorities when your office has raised issues and made recommendation they should at least come back and say we have noted, we agree and this is what we will do or we do not agree because of the following reasons, so you can take it from there but to
20 have a situation where they just completely ignored you and you never - you are not – you never know whether they did anything seems untenable.

ADV PRETORIUS SC: You are not misrepresenting me, Chairperson, you have got a very sharp memory.

CHAIRPERSON: Yes.

DR DINTWE: Because that is what I was saying and I was saying that I think that we do have a good model to say are these remedial measures, we know that they are not. But I was even saying to yourself that I wish that we had the resources because I was going to take myself to court and say that I do not think that any legislature will have an intention to put so money into this organisation but then recommendations are just being ignored.

CHAIRPERSON: Ignored, ja.

10 **DR DINTWE:** Yes, that was what I said.

CHAIRPERSON: Okay. Mr Pretorius?

ADV PRETORIUS SC: In paragraph 127 on page 814 you cite two examples. I would just like to ask whether you confirm those. You say:

20 “In one instance a member claimed that he had lost an amount of approximately R3.6 million while on an operation. This is clearly absurd. A further finding was that since 2016 there was an SSA member who had been submitting fraudulent travel claims amounting to R9 million.”

Do you confirm that those were findings or investigations conducted by you?

DR DINTWE: These were findings and I write there, I say this is clearly absurd because what came to our attention was that - in the 3.6 million, there is a gentlemen on an

operation to Jupiter, this other planet and he comes back and says but I lost it, they have taken it or I misplaced it or whatever but then he does not even create serious attention or, you know, serious attention because he then tells that I have lost it and you deduct it from my salary.

In fact the gentleman went on an early retirement during the course of 2020 and others, who will know, that their pensions will not even get to that particular amount and in this instance he just came back and said that oh, I
10 have no reasons, I have lost it and please start deducting it and so forth. I am told that that money – and they would have attached his pension if not part thereof. Now this is a problem and it came in the analysis of our evidence. If

Now if I got 3.6 million and I went and bought a property I will be saving about another 100% because if I am buying a property for R3.6 million and it is bonded, I am going to end up paying about R7 million but if I buy it cash and I say that no, no, you can buy that money from my pension it means that I would have received and
20 interest free loan to do other things. That is the first example.

The second example of R9 million in the finding, also, this person is a protector. He is a protector who accompanies a principal when he travels both internationally and locally and our findings is that this

person could not have pulled this mission alone because it is very easy. If I am not travelling overseas but you get my protector coming to claim money that they would have travelled. It should be well-know but no, no, no but he did not apply, you know, to go to this and other country and so forth. So it happened over a period of time until he reached an amount of R9 million.

Inadequate controls and there is an argument about that because other people will say absence of internal
10 controls. No, in this instance controls are there but they are being ignored as well.

CHAIRPERSON: And this would have been in a period of about how many years? Do you have that information?

DR DINTWE: Three years on average, a travel of three years.

CHAIRPERSON: Accumulated to R9 million within three years?

DR DINTWE: That is correct, Chairperson, yes.

CHAIRPERSON: Okay.

20 **DR DINTWE:** It also tallies with the usage of cash. I will never understand why do they give me cash when I travel outside the country, I just do not know, because it is even risky, I am called Inspector General Intelligence, I am not collecting intelligence, I am not doing anything, I am oversight body. But believe you me, when I travel they

give me that kind of cash. So when I come back normally I will return some.

CHAIRPERSON: Not millions.

DR DINTWE: I beg your pardon?

CHAIRPERSON: Not millions.

DR DINTWE: No, it will not run into millions, ja.

CHAIRPERSON: Ja.

DR DINTWE: Yes.

ADV PRETORIUS SC: Is this a convenient time, Chair? It
10 is, let us take a 15 minutes break, we will resume at half
past eleven.

ADV PRETORIUS SC: Thank you, Chair.

CHAIRPERSON: We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay, let us continue.

ADV PRETORIUS SC: The examples that you have given
to the Chair, Dr Dintwe, both at a general level and at a
particular level. Were these included in the certificates
20 that were given to parliament and to the Minister and the
heads of department?

DR DINTWE: I confirm that, Chairperson.

ADV PRETORIUS SC: In paragraph 128 you raise a
concern about the possible use of these monies. What do
you say about that? That is on page 815.

DR DINTWE: I am saying that they were used to fuel or finance a particular – I mean, a particular faction depending on who is taking that money. Our finding in that regard is not one-sided at all.

CHAIRPERSON: So it is like different people may have taken monies to finance different factions.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And that information too would be in the certificates.

10 **DR DINTWE:** It will be in the certificates.

ADV PRETORIUS SC: Having been reported to parliament?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Or at least to the joint standing committee on Intelligence.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: You say in paragraph 129 that you made certain recommendations in a report and you talk of one of your reports, would this report have been included
20 in your certificates?

DR DINTWE: It is certificate – I think that I used the word report interchangeably there.

ADV PRETORIUS SC: Okay, so it was a certificate reported to all those instances to whom you have referred including the JSCI?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Right.

DR DINTWE: Would you not like me just in one or two sentences explain why I would have used the word report over there? So over and above the certificates, I also do what is called monitoring reports. Now monitoring report, I may change just one subject because the certificates will run – will deal with issues, a variety of these sort of issues but in this instance I may decide to do a monitoring on
10 procurement maybe of software, for instance, and just write that particular issue and then I will send to a responsible minister.

ADV PRETORIUS SC: Would those reports go to parliament?

DR DINTWE: They will then go to parliament because a certificate is a culmination of your review reports monitoring reports, outcome of investigations.

ADV PRETORIUS SC: I see.

DR DINTWE: So even if I would have sent only this
20 subject right in the middle of every reporting year it will then be found in the certificate as well.

ADV PRETORIUS SC: Right. Perhaps you should read onto the record your recommendation in paragraph 129.

DR DINTWE: I will do that, Chairperson.

ADV PRETORIUS SC: Thank you.

DR DINTWE: I say:

“Whereas the movement of large sums of cash is justifiable within the context of secrecy of operations there is a need to ensure stricter controls to ensure full accountability for cash given to members for operational purposes. However, the veil of secrecy associated with intelligence operations does not make any public servant immune to accountability and sound financial management hence the person who claims any money or uses the resources of the SSA is required to settle such in accordance with applicable prescripts. During over certain engagements I came across a number of instances where the monies are not properly accounted for. I am aware that even the SAA internal investigative units are currently working on several cases where money is not accounted for.”

ADV PRETORIUS SC: And then you go in page 815, paragraph 130 to talk of recommendations that you made in your capacity as Inspectors General Intelligence. What were those?

DR DINTWE: It was that although the control measures are there, they need to be tightened a little bit because some of them were too old.

ADV PRETORIUS SC: A little bit?

DR DINTWE: Old for my liking, in any event even the secretary's account I think it was 1957 or so.

ADV PRETORIUS SC: No, you used the word a little bit. Was it just a figure of speech?

DR DINTWE: Maybe too old. Ja, but my intention was to say that they could be a little bit old, just too old for our liking and that ...[intervenes]

CHAIRPERSON: But I think Mr Pretorius is suggesting
10 that in the light of what appears to be large scale abuse of monies that should be used legitimately for Intelligence the tightening should not be or cannot be for just a little bit, much more is required. I think [inaudible – speaking simultaneously]

DR DINTWE: Yes but my quagmire is that times will differ.

CHAIRPERSON: Ja.

DR DINTWE: So they would have amended one out of fifteen. Maybe in 2009 they would have, you know, adjusted three or four in 2014 and so forth. That is why I
20 cannot use an umbrella weight that too old..

CHAIRPERSON: Okay, alright.

DR DINTWE: For us, yes.

ADV PRETORIUS SC: We have heard the evidence of Mr Jafta as to what steps have been taken more recently in relation to financial controls but it appears from your

evidence that what you are saying is a substantial review of control measures and their implementation is required within the SSA and other intelligence organs.

DR DINTWE: That is correct, Chairperson, but I also said in this instance that they must be both preventative and deterrent.

ADV PRETORIUS SC: Right. And you say that steps should be taken to recover outstanding temporary advances from members who have not settled those.

10 **DR DINTWE:** That is correct, Chairperson.

ADV PRETORIUS SC: Now all these issues concerning financial controls, the absence of financial controls, the loss of state security monies, the inadequate controls over the use of cash are – and which you have now highlighted over the last hour or so, your report or your reports or your certificates audit to the JSCI and the Ministers would contain detail in this regard.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And would contain detail in regard
20 to your recommendations.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: How is – and these questions I have been asked to raise in relation to further evidence to be led by Adv Freund, who I have spoken to in the break, Chair – to whom does this report go in particular? I mean,

does it go to the secretary of the JSCI? The Chair of the JSCI?

DR DINTWE: We address them to a Chairperson.

ADV PRETORIUS SC: Right, who is the Chairperson of the JSCI or who was the Chairperson of the JSCI at the time you would have been submitting these reports?

DR DINTWE: Previously it was – no, there is a previous committee, the immediate previous one, it was Mr Nqakula, who then was transferred to the Presidency as State
10 Security Adviser and during that particular time there was an acting Chairperson, Mr Ganebe and we then also – okay, ja, Mr Ganebe acted for a while. With the current one is honourable Maake

ADV PRETORIUS SC: Now this is a multi-party committee, as I understand it.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And did you ever have occasion to speak to any member of the JSCI and say what is going on? Why are you ignoring my recommendations? What are
20 you doing about my reports. Was there any interaction of that nature either in correspondence or verbally?

DR DINTWE: I would not address any formal letter to any other person except for the Chairperson but I cannot rule out that there could have been a discussion between myself and one of the members because they also had an

open line to myself. In fact one of the people that I remember raising these issues with is General Bantu Holomisa because he was sitting in the previous committee but apart from that, there is also a Chief Whip, a Deputy Chief Whip in parliament that I also have that kind of an open line. So we would have had those discussions about these issues.

ADV PRETORIUS SC: So you would have in discussions raised concerns about your certificates, how they were
10 considered and what was being done in response thereto?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Are you able to say – do you feel comfortable to say what General Holomisa said to you?

DR DINTWE: General Holomisa said that he is aware – normally he will sort of give me counsel, such as you have to be strong, we are aware that you are doing your work and perhaps he could have promised me that he will see how he would nudge, you know, the Chairpersons or the committee itself in its entirety to really implement these
20 things because all these people that I would have, you know, talked to, they were aware of the rot that was dipping especially in the State Security Agency but also in Crime Intelligence, so they were not oblivious to those.

Can I say that there is an interview that was done by one of the current members, Dr Mbuyiseni Ndlozi who

said in that interview on TV that he is aware that we are doing what we are supposed to be doing but the failure is at the point of implementation by the committee itself.

CHAIRPERSON: But somehow it seems that even though different members of that committee may be aware including members of opposition parties serving on that committee, may be aware of the problem, it looks like they cannot get action to be taken by the committee because, from what you have said, it looks like no action seems to
 10 have been evident or seems to be taken that is effective. At least, if anything has been done, it seems not to have been effective but you cannot tell what it is that may have been done.

DR DINTWE: That is my submission, Chairperson.

CHAIRPERSON: Yes, yes. And one does not know whether it might be the same problem that has been experienced by some portfolio committees in parliament in regard to oversight where members of opposition parties say we can push as far as we can if the ANC and members
 20 of the party who are in the majority do not agree, we cannot do anything because a decision must be by majority. So one does not know whether that is the situation with this committee as well.

ADV PRETORIUS SC: Well, whether that is a satisfactory explanation or not from a member of parliament is

something we will make submissions on in due course, Chair.

CHAIRPERSON: Ja, ja. No, no, that is fine. Thank you, let us continue.

ADV PRETORIUS SC: But in summary then, the problems that you have raised, the impropriety, the illegalities, the loss of monies, the inadequate accounting for monies, the looting that you have spoken about, the improper use of monies in factional battles, those are all in your reports.

10 **DR DINTWE:** They are all in my reports, Chairperson.

ADV PRETORIUS SC: No member of the JSCI can claim ignorance of what you have reported to the JSCI.

DR DINTWE: Not at all because, to confirm that, I would submitted the certificates in a redacted version for the Chairperson. All what I removed was methods that they use, sources but I also removed organisational weaknesses. But in terms of the transactions I made it a point that the Commission, you know, becomes aware.

ADV PRETORIUS SC: So when we get those certificates
20 the Chair will be able to see exactly what the JSCI knew, apart from the redaction.

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: Would you be able to say whether because of the redaction, the redactions that you made, there would be nothing wrong with those reports. Now I

cannot remember whether they are classified or not, your certificates, being available to the Commission if those redactions have been made or they will still be a problem even if there are redactions?

DR DINTWE: No, there would not be problems because I deal with administrative issues.

CHAIRPERSON: Yes.

DR DINTWE: With regard to procurement, for instance.

CHAIRPERSON: Yes.

10 **DR DINTWE:** And I think I will make submission earlier or later to say that there is generally over classification and it done to hide malfeasance.

CHAIRPERSON: Yes.

DR DINTWE: So I have worked on the certificates to an extent but I am satisfied that they can be made public also.

CHAIRPERSON: Okay.

DR DINTWE: That is the reason why I would removed the other issues.

CHAIRPERSON: Yes, yes, well I would be very interested
20 in seeing those certificates, those report insofar as one can look at them without any problems in terms of security and so on.

DR DINTWE: Thank you, Chair.

ADV PRETORIUS SC: Chair, our understanding, we have looked at this quite carefully and have consulted externally

as well, is that you would be entitled, as Chair, to see the unredacted versions of the certificates.

CHAIRPERSON: Yes, okay.

ADV PRETORIUS SC: However, for the purposes of your report and whatever goes public, the redacted version would be necessary to be revealed.

CHAIRPERSON: Ja, okay.

ADV PRETORIUS SC: Provided, of course, the person in control and who has the lawful power to deal with it
10 agrees.

CHAIRPERSON: Ja, okay. No, that is fine.

ADV PRETORIUS SC: And that is Dr Dintwe.

CHAIRPERSON: Ja, no, no, that is fine. I think it would be important in order to get the full picture. Whatever can be dealt with publicly without being in breach of any law, it would be good to look at that. Whatever I can look at away from the public, that might also be important if it can be done.

ADV PRETORIUS SC: We will consider the position.

20 **CHAIRPERSON:** Ja, okay.

DR DINTWE: I have considered that position. It is in fact my administrative decision that I said to the co-functionaries that I consulted with to say that there are two levels of disclosure here. The first disclosure is to yourself, Chairperson, and maybe I also mean the legal

team. The second disclosure is then to the public.

CHAIRPERSON: Ja, ja. Okay, alright.

ADV PRETORIUS SC: Thank you. In paragraph 131, page 816, you deal with what is another serious issue in your terms in relation to Crime Intelligence and you say in paragraph 132:

10 “Our investigations have revealed that the systematic and endemic institutionalised looting of the Secret Services account is carried out and perpetuated by senior managers within Crime Intelligence and their trust subordinates under the guise of legitimate intelligence operations in order to avoid culpability and accountability in the event of detection.”

Now these issues or some of them at least are in the hands of law enforcement agencies at present but would you tell the Chair, please in general terms what you say in paragraphs 131 and following? And you give an example in paragraph 133.

20 **DR DINTWE:** Yes, I give an example of that and I used the word looting deliberately because pure looting. Yes, of course, there are investigations that are taking place. We were also promised that the Crime Intelligence itself will conduct its own internal investigation. To date we are aware of about two members who are dismissed. I think

that they have appealed and so forth based on those findings.

Now what was happening there and I am giving an example later, is that we were even calling the subordinates their runners. What would happen is that a Chief Financial Officer based at Crime Intelligence will be involved in operations. An example of an operation here is that he will handle a source and it is not acceptable but because he cannot go and claim money for that particular
 10 source, he will use a Captain or a Colonel or a Warrant Officer somewhere because he will be a Major General. So a poor Captain will go, collect money, give it to the CFO, the CFO will then claim that I would have paid a source and the settlement will then be done on behalf of the Captain not on behalf of the person claims that they are actually real handlers of the particular person. So we are calling them runners, that these senior managers will then have these other people.

ADV PRETORIUS SC: So a senior official would require a
 20 subordinate to go and collect money allegedly for the payment of a source.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: That money would be given to the senior official who had no authority to deal with sources at all.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And that senior official would then say or claim, perhaps not, that that money had been handed to a source, correct?

DR DINTWE: Yes, he would just return and give him something and say that I have given to the person that I have given so he can go back and [inaudible – speaking simultaneously]

ADV PRETORIUS SC: But the person accounting to the
10 system, as it were, the accounting system, would be the runner, the person deputised by the senior official, is that correct?

DR DINTWE: That is correct, Chairperson. And during the investigation what was also surprising is that – I think that we have an affidavit, I stand to be corrected, here by the staff members in my office, but many instances where a subordinate will tell us that I did not have any proof that the money was given to a source, I do not even know who that source is.

20 **ADV PRETORIUS SC:** Yes, that is a point I wanted to raise, the subordinate or the runner who is used to collect the money allegedly to hand over to a source and as used by the senior officer, that subordinate or runner has never seen, in this example, the source.

DR DINTWE: Not at all.

ADV PRETORIUS SC: Cannot. But, nevertheless, accounts and says that the money has gone to the source.

DR DINTWE: Yes, that is what the account will say.

CHAIRPERSON: Let me also just make sure I understand it. So you have somebody such as a CFO who, in terms of his authority and job description, is not supposed to have a source.

DR DINTWE: That is correct, Chair.

CHAIRPERSON: And a source here is an operative, is
10 that right or it can be...

DR DINTWE: I do not know I will – I will not be discussing the method here.

CHAIRPERSON: Ja, okay.

DR DINTWE: But a source could be somebody at a different rank.

CHAIRPERSON: Who gives information.

DR DINTWE: Yes, it is somebody that takes a rank, ja, it is not a police official.

CHAIRPERSON: Hey?

20 **DR DINTWE:** It could be somebody that ...[intervenes]

CHAIRPERSON: Yes, okay.

DR DINTWE: That I saw when this thing was happening.

CHAIRPERSON: Ja. Yes, it is somebody who gives information required by the organisation.

DR DINTWE: That is correct.

CHAIRPERSON: Okay, alright. And there could be different categories but that is the general.

DR DINTWE: Yes.

CHAIRPERSON: So if I, as CFO, want some cash, maybe from time to time I could just have somebody that I connect with, a subordinate of mine who, in terms of the law, is entitled to have a source.

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: And then I give the money to my
10 subordinate to give to the source and then I get it in some other way or no money gets given to the source physically but the records are written in such a way as if my subordinate gave money to a source.

DR DINTWE: No, you I misunderstood me there.

CHAIRPERSON: Yes.

DR DINTWE: And it is very critical that I explain.

CHAIRPERSON: Yes, yes.

DR DINTWE: Now the CFO instructs the subordinate to go to accounts department and collect money there.

20 **CHAIRPERSON:** Oh.

DR DINTWE: And the reason that he is using there is to say that you know that I have ...[intervenes]

CHAIRPERSON: A source.

DR DINTWE: A responsibility to handle a source.

CHAIRPERSON: Yes.

DR DINTWE: So this money that I am taking from you is for a source.

CHAIRPERSON: Is for a source, okay.

DR DINTWE: But it never goes to the source himself, he gives it to the CFO.

CHAIRPERSON: To the CFO.

DR DINTWE: Yes.

CHAIRPERSON: Oh, okay, so ...[intervenes]

DR DINTWE: And then the CFO tells him that no, do not
10 worry, I am going to give to the source.

CHAIRPERSON: Oh, so suddenly the CFO must give to the source.

DR DINTWE: Yes, that is the claim by him.

CHAIRPERSON: But would the – would both of them know – I guess the CFO knows the subordinate would know what is going on, that this is criminal?

DR DINTWE: They know, the CFO knows, the subordinate knows.

CHAIRPERSON: The subordinate also knows.

20 **DR DINTWE:** Yes. That is why we are calling them runner because I think that there was a suggestion by the evidence that they could have been getting some kickbacks.

CHAIRPERSON: Ja, ja.

DR DINTWE: But we did not have that – because why

would you go there?

CHAIRPERSON: Yes.

DR DINTWE: Because when questions are asked, they will not be posed to the CFO, they will be posed to yourself as a real handler, as you claimed.

CHAIRPERSON: Yes, yes, okay.

ADV PRETORIUS SC: And there is an added element that you have just said that perhaps the public requires a more detailed explanation or a clearer summary. Chair, I will
10 attempt to do that. The CFO says to a subordinate you go and fetch money and you tell administration that it is for a source and you give it to me.

DR DINTWE: That is correct.

ADV PRETORIUS SC: And then the CFO says I am going to give it to a source. He may or may not do so.

DR DINTWE: That is what our proposition is.

ADV PRETORIUS SC: Right. So he may keep the money.

DR DINTWE: That is correct.

ADV PRETORIUS SC: He may give the money for another
20 illegitimate purpose because the CFO has no mandate or power to deal with monies in this way.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: That is why he must use a subordinate who had the power to go and get the money in the first place.

DR DINTWE: That is correct.

ADV PRETORIUS SC: But importantly, also to report that the money has been given to the source, when he does not know that at all.

DR DINTWE: That is correct.

CHAIRPERSON: So - but the subordinate also knows that what the CFO is doing is criminal because he knows that it is not part of the CFO's job to be paying sources or is there no such – or is that not the position?

10 **DR DINTWE:** Although we would not have concrete evidence to say that they were getting kickbacks and that is why I am using this word selectively of a runner.

CHAIRPERSON: Yes.

DR DINTWE: But he is aware that in terms of the prescripts that is not allowed.

CHAIRPERSON: Yes.

DR DINTWE: And if he was oblivious to that, he would ask the CFO as to why do you not go straight there?

CHAIRPERSON: Yes.

20 **DR DINTWE:** So this is an activity of a person who is fully aware that the CFO cannot handle a source.

CHAIRPERSON: Well, I guess the bottom line is the law does not allow the CFO to be taking money to a source because if the law allowed that, the CFO, if he was acting lawfully, would go to the accounts department himself.

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: Yes. The reason why he must use the subordinate is because he is not allowed to go there and claim money from the accounts department for purposes of giving to a source.

DR DINTWE: That is correct, Chairperson.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: You give another example in paragraph 134, page 817, but you have dealt with the
10 system that can be used or abused. Paragraph 135 you say:

“There are many other instances which include the misuse of monies from the Secret Service account. Misuse of safe houses and the renting out of personal houses by senior managers as safe houses to Crime Intelligence at inflated prices. Investigations into these abuses cannot be concluded because there is a refusal to declassify documents.”

20 Let us deal with the first issue first. We know from other sources that these – this type of misconduct or illegal use of monies and assets has occurred but was this also part of your investigations and were these your findings?

DR DINTWE: These are finding, Chairperson.

ADV PRETORIUS SC: On investigations into the detail?

DR DINTWE: The details.

ADV PRETORIUS SC: And you have summarised the findings here, or you have summarised the type of malfeasance that occurred?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Right, would these issues and reports and findings also be included in your certificates?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Alright. You then say something in
10 addition in paragraph 135. You say:

"Investigations into these abuses cannot be concluded because there is a refusal to declassify documents."

Before you answer the question that I would like to put to you, I would like to put you a preliminary question. Is it clear to all concerned that classification cannot be used to conceal criminality?

DR DINTWE: That is the general principle, the general rule.

20 **ADV PRETORIUS SC:** Is it also clear to all concerned in terms of the legislation that classification cannot be used as a reason for not giving you documentation?

DR DINTWE: That will be my response, but there is a rider to that. That last sentence does not refer to us. It does not refer to the investigations conducted by the office

of the Inspector-General of Intelligence. I do not know. I may have – it sounds as if that is the submission but it is not a submission. When I say investigations cannot be concluded, now I am referring to criminal investigations and we have got instances such as those.

ADV PRETORIUS SC: Right.

DR DINTWE: In our chains they do not have a right to withhold any information.

ADV PRETORIUS SC: Yes.

10 **DR DINTWE:** Whether classified or not.

ADV PRETORIUS SC: That's good.

DR DINTWE: We always give to others. So our investigations in the specific case will be concluded, but the other investigations that follows will be hampered by refusal to declassify.

ADV PRETORIUS SC: Right.

DR DINTWE: So I am referring to investigations such as those conducted by IPID, for instance, and those maybe conducted by the Hawks.

20 **ADV PRETORIUS SC:** We will come to those in detail in due course. The regulations in terms of security are unfortunately and ironically and quite improperly kept in our submission themselves secret. So the law or the regulation which says you cannot use classification to conceal criminality secret, but that principle is widely

known, as I understand it.

DR DINTWE: It is widely known and I think that it is laughable. In fact, the team have always laughed about it. Maybe I should just explain what happened with this specific one.

ADV PRETORIUS SC: Yes, please.

DR DINTWE: Now, the SSA wanted to develop a regulation which will sort of put into effect the provision of the missed documents. Now we decided that we should
10 have our own document in the regulation which takes that position which states it cannot classify documents to hide malfeasance. But guess what they do, Chairperson? The very same reason they classify it as secret.

ADV PRETORIUS SC: So it has the consequence, Chair, that any person affected or interested in unlawful classification of documents cannot source the very regulation that deals with it.

CHAIRPERSON: But the classification of the law, you know, the classification of such a document cannot be
20 legitimate. I mean, if you do that, how do you expect that people will benefit from the principle that you cannot use classification to hide criminality?

ADV PRETORIUS SC: Yes. Well, Chair, the idea that one could classify the law.

CHAIRPERSON: I mean, you just have to say it to realise

how absurd it is.

DR DINTWE: There is another dimension to that, Chairperson. Now, I am just imagining that if it was myself and I contravened the same regulation and that they wanted to ask me questions. Let's say we are an operating and over-classified and they said oh, but you have contravened that. My response will be that once you classify and say that you will apply a principle of need-to-know, so which means that I may not have been considered
 10 as a person who should be aware of that particular ... And I can easily say that was classified. I did not have access to it. So you are defeating your own purpose, your own objective by ensuring that people do not over classify because they will say but I am not aware of that.

ADV PRETORIUS SC: Yes. And it goes a lot further than criminality. It talks about administrative abuse as well, that classification cannot be used. We can get the wording. I think you deal with it somewhere in your statement. You deal with the expression and the missed
 20 document, but let us deal with it when we get there. In paragraph 136 – well, perhaps we should then just clarify what you say in paragraph 135, that these abuses, this criminality, is reported to a law enforcement agency.

DR DINTWE: Yes, but over and above that their management – divisional management of Crime Intelligence

also promised us that they are going to deal with these issues and they are going to refer them to law enforcement agencies, because our recommendation would be that here is a clear case of criminality, so please refer it. We do not want to replace the management of these agencies. We can only flag and point out to where malfeasance, especially criminality, would have taken place.

ADV PRETORIUS SC: It is up to them to take it further in terms of law enforcement, prosecution and the like.

10 **DR DINTWE:** That is correct, Chairperson. And I think that they would have developed an access path for me if I did have to do that, I mean, into the courts. I could be at the Magistrate's Court and the other courts every day of my life because of the level of malfeasance in those particular ...

ADV PRETORIUS SC: Now, but you say that – in paragraph 1.35 you make the point that these law enforcement agencies, their investigations and prosecutions are hampered by their refusal to declassify
20 documents.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And in paragraph 136 what is the evidence that you give there?

DR DINTWE: Alright.

ADV PRETORIUS SC: It is another form of fraud or

malfeasance.

DR DINTWE: Yes, it is another - it is another form. And maybe I can use an example of what happened there. So they would have told us that they procured and ...[indistinct]. Chairperson, I do not want – because it will be names of companies normally. But on Advocate Pretorius's laptop he will have, like, for an example antispyware in that. So normally he will – you will pay a certain licence fee. So they bought something along those
10 lines in the region of millions and the intention of that particular licence was to protect the principles within the environment – within the management so that their gadgets could not be easily intercepted by foreign, you know, agents and so forth.

But now what we found – because I went there personally again. What we found is that, in fact, the licence itself or the software was never delivered and the investigators in my office were actually tipped that it was never delivered and it was about to expire. So normally
20 you will pay it for a period of 12 months. But when we went there we satisfied ourselves that it was supposed to be still there and we requested that we should be taken there so that we can observe it. And there was a confirmation that it was not available. It was never delivered.

ADV PRETORIUS SC: So procurement funds, funds for procurement, are basically stolen.

DR DINTWE: That is correct. They buy non-existent things.

CHAIRPERSON: Which means they pocket the money.

DR DINTWE: That is the only inference I think that one could make.

CHAIRPERSON: But on the records – the records will say the money was used to buy such-and-such an equipment or
10 something like that but the equipment would not be there.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And just to confirm once more, these various investigations in their detail, including your findings and recommendations, would be in the certificates you have spoken about.

DR DINTWE: That is correct. I confirm that, Chairperson.

ADV PRETORIUS SC: Okay. Let's move on then to paragraph 137 on page 817. What is a grabber without revealing too much method?

20 **DR DINTWE:** Well, the general came back that they use and there is a second gentleman who is appearing before a court in Centurion ...[indistinct] so it is in the public domain.

ADV PRETORIUS SC: Okay.

DR DINTWE: But a grabber is an equipment that can be

placed within a particular radius and it will be able to create a tower. But there are side issues. But it will create a tower. So, in other words, when I call the Chairperson you will have the other line, so that machinery will be, like, between myself, so call it eavesdropping, because that particular person that is not really prevent my communication to reach you but the only effective ability of hearing the conversation between myself and the Chairperson.

- 10 **ADV PRETORIUS SC:** If the grabber is placed in the required radius of a party conference, and you gave this evidence now, it would be possible for the person in control of the grabber to hear everything that is spoken over a cell phone.

DR DINTWE: That is correct, *ja*, including it goes to the extent of emails as well.

ADV PRETORIUS SC: Emails as well.

DR DINTWE: So let us say digital communication in general.

- 20 **ADV PRETORIUS SC:** So all electronic communications would be able to be monitored within the specific required radius of the grabber?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: So in paragraph 137 you refer to media reports. Would you, without naming the company

and the name of the person who is the director of the company, please – and I will explain the circumstances thereto in due course, but would you tell the Chair the story of the grabber?

DR DINTWE: Alright.

ADV PRETORIUS SC: And its procurement.

DR DINTWE: Okay. However, we use the names that we will have used. I think it is very important to refresh the Chairperson's memory to say that there was this gentleman
10 called – that we called Ivani here.

ADV PRETORIUS SC: Ivani?

DR DINTWE: Yes. Who is a director of a company called IDI. So this person is the person who accompanied a group of other people to go investigate ...[indistinct]. He is the same person now, but he is appearing under the other circumstances. Now, just days before the NASREC conference I received a call from Mr Mbindwane, Mr Bongani Mbindwane. He was given notice. I am aware of that, Chairperson. And at that time he was the advisor to
20 the then Minister of Police, Mr Fikile Mbalula. And what he informs me is that, "There is an urgent issue that I want to discuss with you." And obviously he was telling me that he is sent by the minister, but I really have to impress upon the Commission that the minister never requested me to attend that particular meeting but I went there. And then

when we met at that particular place he told me that there was a group of backpackers who wanted to influence the conference, the outcome of the conference, the NASREC conference, and ...

ADV PRETORIUS SC: That is a group?

CHAIRPERSON: I'm sorry. A group of what?

DR DINTWE: He called them backpackers.

CHAIRPERSON: Backpackers?

DR DINTWE: Yes.

10 **CHAIRPERSON:** Okay.

DR DINTWE: Well, they use that concept in criminology and so forth, but it will be, like, people who will claim to be tourists, for instance, so they are known to have those backpacks, you know. It may be full of cameras and so forth.

CHAIRPERSON: Because they ...[indistinct].

DR DINTWE: Mr Chairperson, that is how you describe that group of people who were said to be coming from a foreign country and they were, you know, littered around
20 Soweto. So he told me that the biggest challenge that they have is that the then acting divisional commissioner of ...[indistinct] did not want to procure the grabbers. He said that they were actually in need of grabbers to the region of R210 million. However, because the date was too close they could settle for one grabber at a tune of R45 million.

He explained, like, you know, the idea. This is how it works. These are the capabilities so do not be surprised that it is so expensive. An ordinary grabber costs around R7 million.

But the reason why he called me was to say that the divisional commissioner was scared or did not want to purchase because I was conducting some investigation with the previous procurement. And I felt so bad. I said how could they want to use my name and if something
10 terrible really happened it will seem as if, you know, I was involved in that, hence I promised him that I will go to the divisional commissioner and change it. "No, no, do not worry. If there is a threat and so forth, leave. Continue. Manage the organisation and make decisions." And that is what I did. I left there immediately and I went to see the divisional commissioner. I know I am taking long, but I think it is important to do this.

When I got to where the divisional commissioner was he was not at his headquarters. He was there at the
20 other place. We met. So we will normally meet in a room, so he had ...[indistinct] room. We did not even get to sit down, because the divisional commissioner then asked me, "Are you aware of the company that they want me to procure from?" I said, "No, he did not tell me." And he mentions this company, IDI, and I immediately said that,

"No, no, but he was not honest with me, hence I am no longer getting involved in this particular issue." "Then I understand why you do not want to procure." And that is where we ended on that day, claiming, the divisional commissioner that, "No, no, I was coming to permit you or somehow tell you that I will not stand in front of any procurement." But in this instance I am no longer getting involved.

ADV PRETORIUS SC: I would say in summary there was
 10 an attempt to procure and it seems to me that you suggest, at least in your statement or your affidavit, at an exorbitant price a grabber for use at the NASREC conference of December 2017.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Is it correct that that intended procurement was halted by IPID?

DR DINTWE: That is correct.

ADV PRETORIUS SC: And amongst the reasons, as you say in your statement, was that the company from whom
 20 the grabber was to be procured had already been flagged in relation to irregular procurement previously.

DR DINTWE: That is correct, Chairperson. But we also as the office of the OIGI we are involved in keeping the IPID. In fact, a senior manager from my office was working with a senior manager from IPID, because we had

information and I am calling it *information*, not *evidence*, information to say that the rest of the money will be used to buy votes at NASREC.

ADV PRETORIUS SC: So not only was the procurement process irregular, not only was the party from whom the grabber would be procured already under investigation for irregular procurement, but you had information that you used to which the grabber would be – sorry, not the grabber – used to which the money would be used, either
10 through inflated procurement ...[indistinct] inflated procurement prices was the information you received was to buy votes at NASREC.

DR DINTWE: That is correct. And it sounded probable. That's when we interrupted or intervened, because the grabber's original price or average price would be R7 million, but here in this case they wanted R45 million to buy only one grabber.

ADV PRETORIUS SC: Right. And during this process when problems arose about the procurement, influence was
20 sought to be exercised on you to facilitate the project. Is that correct?

DR DINTWE: That is correct, Chairperson. Maybe I should also mention that I stopped somewhat about this procurement, but there was a subsequent meeting again that took place in front, Chair.

ADV PRETORIUS SC: Well, let's tell the Chair about that, please?

DR DINTWE: Alright. Now, after withdrawing – telling the divisional commissioner that I will not get involved in this because I did not make those decisions, I then received a WhatsApp message that I am attaching the documents that will be coming from Mr Bo Mbindwane, saying that, "AG, I had thought that we agreed on a particular position." And my understanding is that that WhatsApp message came as
10 a result of the Divcom, the divisional commissioner, telling Mr Mbindwane that, "No, no, that guy did not, you know, agree or he did not want to get involved in this particular process." And then I said that, "I will settle then for a tripartite meeting, because I spoke to you alone. I went somewhere else and I got a different story, so let us meet." And yes, of course subsequently we met here in Sandton and again I reiterated that I do not get involved in procurement by any of the services, as long as they procure in accordance with the applicable prescripts,
20 whether applicable with any other legislation that regulates procurement. And I ended up in leaving that particular meeting and they give ...[indistinct] behind with Mr Mbindwane.

ADV PRETORIUS SC: Alright. Now, so Mr Mbindwane had been involved in procurement at all?

DR DINTWE: He was involved. That is ...

ADV PRETORIUS SC: But should he have been involved?

DR DINTWE: No, he should not have. He is a ministerial special advisor. Even the minister, I mean, for that matter never really gets involved in ... That is exactly what they tell us. And in this instance I have to be very clear that even Minister Mbalula has never, ever discussed this matter with myself. It was the advisor who was pushing for this.

10 **ADV PRETORIUS SC**: Alright. And the relevant crime intelligence unit that would have been responsible for the purchase of this grabber, was it ever consulted? Did you investigate this issue?

DR DINTWE: I investigated it though they were never ...[indistinct].

ADV PRETORIUS SC: They didn't even know?

DR DINTWE: They didn't even know that there was a process to a trial and a purchase of this particular equipment.

20 **ADV PRETORIUS SC**: Alright. Now, you say ...

DR DINTWE: And – sorry, sorry. This could be very much important to say that if I'm hacking surveillance in crime intelligence journals, they call me end user. In other words, I am the one who initiates the process, who go to the procurement people and tell them that I am in need of

these three bottles of water and then they will conduct their own research, source the prices and then buy. So I am an end user. I must initiate. It cannot be initiated anywhere else.

ADV PRETORIUS SC: Alright. Now, you say in paragraph 143 that:

10 "Media reports suggest that the money was, in fact, intended to be utilised for vote-buying during the mentioned ANC conference. I cannot comment on the correctness of these reports other than to note that the procurement process was stopped when IPID became aware of the irregularities and raised a query."

Is that – are those comments an accurate reflection of where you stand in relation to your own knowledge?

DR DINTWE: It is correct and that is the reason why I said that information should not be misconstrued for evidence.

20 **ADV PRETORIUS SC:** Right. So you were relying on media reports. You had a suspicion. Those suspicions were corroborated but you have no knowledge of that fact, of the vote-buying.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Right. But you say that that matter is under investigation by IPID.

DR DINTWE: Yes, it was under investigation and there was also litigation with regard to that particular matter, in fact, yes. There was a finding per se – I mean, a judgment which states that those documents must be declassified.

ADV PRETORIUS SC: Now, well, that is the point. IPID was investigating the series of events, right?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Were they able to access the relevant documentation?

10 **DR DINTWE:** Not at that stage.

ADV PRETORIUS SC: Not at that stage. Before the court case?

DR DINTWE: Before the court case, yes.

ADV PRETORIUS SC: And how did this affect their ability to investigate this obvious – well, certainly obvious allegations of criminality?

DR DINTWE: The investigation could not even take off as far as I know, because there was an application by police management, including Mr Mbindwane, to say that IPID
20 cannot have access. And I think that interdict was, you know, issued until there was an appeal or a review as far as that decision was concerned, yes.

ADV PRETORIUS SC: Now, all these are serious allegations. Are they currently still under investigation?

DR DINTWE: We know a lot more now. But even at that

stage as the office we knew more than what IPID knew because we were in possession of these documents.

ADV PRETORIUS SC: Right. And is your office investigating the matter?

DR DINTWE: Yes, our office also got involved in the investigation of that particular matter. Remember that I always say, Chairperson, that the other agents cannot stop the investigation on our behalf or at our instance, because we are reporting to different authorities. So IPID was
10 conducting a criminal investigation. We were conducting, if you'd like, oversight investigation.

ADV PRETORIUS SC: And would you have reported your investigations through the various instances in your certificates or would you do that in the future?

DR DINTWE: It will be in the certificate, this one, because it is a 2017 matter, so it will be in the 2017/2018.

ADV PRETORIUS SC: So all this has been reported to Parliament?

DR DINTWE: That is correct. Yes, that is correct.

20 **ADV PRETORIUS SC:** And the response?

DR DINTWE: No, there was not a response as far as that is concerned. But I think that even the ANC members in that committee were really concerned and worried about what I have reported ...[indistinct].

ADV PRETORIUS SC: Was this reported to you, this

concern?

DR DINTWE: *Ja*, the concerns. So it will be during the deliberations, during presentation when they started comments and so forth to say that this is worrisome that it is actually happening.

ADV PRETORIUS SC: Right. So did you make a presentation on the basis of your certificate to the JSCI in relation to this?

DR DINTWE: That is correct. I did that, Chairperson.

10 **ADV PRETORIUS SC**: And what ...? Well, I suppose the proceedings are top secret. Is that not correct?

DR DINTWE: *Ja*, they are.

ADV PRETORIUS SC: So we will consider that position and deal with it but maybe the Chair wants to ask a question.

CHAIRPERSON: Well, I'll ask the question. You know what you would have said to the committee. You cannot tell us what the committee said, but what you can tell us is whether subsequently there was anything you learnt there
20 which indicates that the committee has done something about it.

DR DINTWE: I do not think I clearly understand your question, Chairperson.

CHAIRPERSON: Okay. I am trying to deal with the problem that you cannot tell us what the committee says,

but you can tell us if indications are that something has been done.

DR DINTWE: Okay. Now ...

CHAIRPERSON: In terms of what you have observed since then.

DR DINTWE: The other part then happens in the public domain.

CHAIRPERSON: *Ja.*

DR DINTWE: It displayed itself, so I do not have
10 reservations informing the committee what happened then about this.

CHAIRPERSON: *Ja. Ja.*

DR DINTWE: I think two issues that I want to mention, Chairperson.

CHAIRPERSON: *Ja.*

DR DINTWE: Now, during the time that it was reported in the public domain there was an expression by senior ANC officials who are not even in Parliament to say that this is worrisome and these monies are used to fuel the factions.

20 **CHAIRPERSON**: Factions.

DR DINTWE: Yes. In the ANC and some of them were also worried to say that to what extent can Intelligence be involved in the internal for that event, because that is an internal ANC event, it is not a government – government event.

CHAIRPERSON: H'm.

DR DINTWE: There is confirmation that officials of Crime Intelligence were even removed from NASREC and they were told to go a little bit far because they were causing problems for that particular conference, but now after the Court decision this issue came to the fore again, and now there are two incorrect narratives that have been created about this particular issue.

That the declassification of the documents revealed
10 two things that General Sithole never signed the procurement of this grabber of R45million. The second issue that we lost the declassification is that General Sithole kept on telling the – my other managers, the management that you can do this as long as you comply with procurement prescripts.

So he kept saying those two things but the problem is that the narrative that was being built, whilst this was declassified was that General Sithole signed the submission and that he could have allowed a deviation, but
20 it never really reached a particular stage.

The other issue which is very important and critical to National Securities, but it is in the public domain, again, where Minister Cele accused or said that this grabber with the R45million was also - could also have been used to intercept the emails of the then Deputy President of the

ANC but that event took place way before we were involved in that investigation, way before this attempted procurement.

So those are the issues, the narratives that are incorrect, and they've played themselves out now in the public domain.

ADV PRETORIUS SC: And the correct position, at least the position evidence by the documents now declassified and public was at least that General Sithole did not
10 approve.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Right, you deal in paragraph 144 Dr Dintwe with a new issue and that is an issue involving the same company, Ivane's company and you deal with a different form of corruption or malfeasance in relation to information technology, solutions for Intelligence collection. Could you tell the Chair briefly about what happened here, you deal with in paragraph 144 and 145 of your statement?

20 **DR DINTWE:** Yeah, so this is the general and similar principle that they procure irregularly and sometimes goods are not delivered, the problem that I have expressed. But here let's say that they change the tact, they changed modus operandi.

In this instance they call for quotations and when

we analysed these quotations, there were certain facts, which came to the fore. The first one being that the font the manner, the structure of the quotations was actually similar. The other concern or what we established was that one of the companies that provided one of the quotations was not even involved on this, they told us that they are an HR consultancy company, and they say that they have never even sold an equipment of that particular nature.

ADV PRETORIUS SC: Alright but just stop there, I am
 10 sorry to do this, but I think maybe you and I are out of sync here. I think you are dealing here with paragraphs 146 and 147 the voice encryption system.

DR DINTWE: Oh, ja.

ADV PRETORIUS SC: If you could go back please to paragraph 144 where there was a quotation from the Council for Scientific Industrial Research, CSIR, for the amount of R7million for a particular software solution, and tell the Chair about that incident please, and then we will get on to the voice encryption system.

20 **DR DINTWE:** Alright now...[intervene]

ADV PRETORIUS SC: So at the top of page 820.

DR DINTWE: Yes, I see that look CSIR is a government entity. It is something on those lines and the researchers there will develop some of the solutions for even for State information technology agencies or for other government

departments. So in this instance, they had offered the Crime Intelligence that we could develop this kind of IT solution for yourselves, and it was going to be at around R7million but now that offer was then ignored and SUB-CI then called for the other potential over and above what CSIR would have offered them.

ADV PRETORIUS SC: For R33million.

DR DINTWE: For R33million now this time around.

ADV PRETORIUS SC: Yes, but to make matters worse,
10 you then did an investigation to find out whether this IT solution had ever been actually installed.

DR DINTWE: That is correct Chairperson I did that and I visited personally with members of my office, visited.

ADV PRETORIUS SC: And what did you discover?

DR DINTWE: We discovered that it was never delivered to Crime Intelligence.

ADV PRETORIUS SC: So quotations go out for an IT solution CSIR, say we are provided for R7million.

DR DINTWE: That is correct Chairperson.

20 **ADV PRETORIUS SC:** This particular company says we will give it to you for R33million.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: It is procured from this company, in inverted commas.

DR DINTWE: It is procured in inverted commas, monies

are paid.

ADV PRETORIUS SC: Monies are paid but nothing is installed on your finding.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: And you relate that your personal visit and your personal investigations in paragraph 145 and you say you were informed that the original product no longer existed and had since been replaced but you couldn't be shown the replacement either, is that correct?

10 **DR DINTWE:** I could not be shown a replacement as well, Chairperson.

ADV PRETORIUS SC: Right.

CHAIRPERSON: So again, it's just theft.

DR DINTWE: Pure theft.

CHAIRPERSON: Ja.

ADV PRETORIUS SC: So your conclusion was in paragraph 145, that the amount of R73million was fraudulently paid from Crime Intelligence to this company for a non-existent product and you then say:

20 "IPID has since been investigating this matter that has to go it again, not succeeded in securing pertinent classified documents relevant to its investigation."

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: What would be secret about these

procurement documents?

DR DINTWE: I am arguing always argue that you cannot over classify this issue, just a pure procurement issue. There is nothing National Security about it, there is nothing Intelligence about it, it is like procuring a car.

ADV PRETORIUS SC: Right, and then on paragraphs 146 and 147 on page 820 and following, you deal with the voice encryption system, procurement process, what happened there just briefly? You talk about cover quoting.

10 **DR DINTWE:** Yes, but it is the same company now, this company gets involved in all these kinds of procurement, which I can supplies him and irregular instances not even getting delivery but in this instance that system - oh, but on the paragraph I am talking about flouting of their procurement regulations again.

ADV PRETORIUS SC: Which was also existent you say in relation to the previous issue that you have discussed the software solution, you said that prescripts were not followed.

20 **DR DINTWE:** That is correct Chairperson.

ADV PRETORIUS SC: Here prescripts were also not followed in relation to the voice encryption system where it was procured for about R23 million.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: And you say that all manner of

procurement requirements were flouted.

DR DINTWE: I submit that Chairperson.

ADV PRETORIUS SC: Yes, you say:

“The system was not procured for any Crime Intelligence section responsible for any counterintelligence function.”

Is that correct?

DR DINTWE: Yes, that is correct.

ADV PRETORIUS SC: Right, but...[intervene]

10 **DR DINTWE:** Yes, so in the instance where I said Chairperson, that an end user will be somebody who is responsible for that particular thing. So if you say that it is a voice encryption, if you say it is a grabber and we are looking at some body as surveillance, you know, and all those an issues, but the end user will be somebody somewhere.

ADV PRETORIUS SC: The cost of this procurement, you say in paragraph 146, was R23million.

DR DINTWE: That is correct Chairperson.

20 **ADV PRETORIUS SC:** However you investigated the matter and you saw competing quotes one for R58million, were those genuine competing quotes?

DR DINTWE: They were not genuine and as I say the paragraph that we picked up some of the other thing, for example, in one of those, there was no VAT number, V-A-T

number and it was also apparent that the latter two quotations were for purposes of creating fictitious competition, also referred to as cover quoting, in contravention of their applicable Treasury regulations.

ADV PRETORIUS SC: And that - those were your findings in investigating the facts.

DR DINTWE: Those were my findings, because the name of the director of Company B was also the director of Company C.

10 **ADV PRETORIUS SC:** Okay, alright so a related company issues a quote for R58million and I understand what you mean by cover quoting it makes the quote for R23 million look reasonable.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: Is that the point, you are making?

DR DINTWE: Yes, yes.

ADV PRETORIUS SC: Chair, I must place on record that we have a response from the company, the director who is Ivana but what they say in this response is:

20 “We are giving you this information, we do not know whether it is classified or not that is your problem.”

They say to us. So as a precaution, we have had to consult with the Director General of the SSA, the acting Director, General, who first see whether we can deal with the whole part, and if so, how we can deal with it.

So I am not in a position to put that now, we must go through the process first and then we will put it up for you. But we might just put it up to you anyway under the rubric that it is for your eyes, only.

CHAIRPERSON: Ja, no that is fine.

ADV PRETORIUS SC: Can we move on then on page 8712 to the failure of oversight over the Intelligence Services. Now we have dealt with this piecemeal in several parts of your affidavit to date but if you could just
10 summarise what you say, in paragraphs, 148 to 150 please, and you can do it in summary form because we have dealt with these issues.

DR DINTWE: Yes, and I might need to on paragraph 148, that I am not executing that failure only to the Joint Standing Committee on Intelligence. I am saying that we have failed also as the OIGI and I think that I would have provided reasons what I think were the reasons behind that because we were weakened and all those other things but the failure there of oversight over this organisation is also
20 attributable to us as the office.

ADV PRETORIUS SC: Alright, but in relation to that you have given evidence to the Chair about your independence, or lack of independence, the structural and organisational challenges you face as the office of the OGI its capacitation and funding, we have dealt with that evidence

it is all there. You ask the question in page 8748, you say:

“The Chairperson of the Commission may reasonably ask how weaponisation and fraud and corruption in the Intelligence Services was permitted to continue in the face of the oversight responsibilities which should have been exercised by the OIGI, that is your office, and what the reasons for the failure of such oversight was in the circumstances.”

10 So you are dealing here with a finger that might be pointed at your office.

DR DINTWE: That is correct Chairperson.

ADV PRETORIUS SC: You have dealt with issues in relation to this earlier in your statement last time you appeared before the Chair. But would the same comments that you make now apply to the JSCI with the JSCI is not unrelated in this series of events?

DR DINTWE: It is related and I think that is where previously I said to the Chairperson that no one and no
20 one within this fraternity should come to you and mislead you that we were not aware of this because on paragraph 149 I am dealing with the certificates and I am also referring to what I would have sent, and I think that I am also attaching the letters that will accompany those certificates to the Joint Committee on Intelligence.

ADV PRETORIUS SC: You say in paragraph 149 if I may just read it for the sake of time:

“The certificates that have been produced and presented to the heads of the Intelligence Services, the Ministers of the three departments, and the JSCI over a period of time, reflect the many findings of wrongdoing by the Intelligence Services made by my office. Monies have been stolen from the Intelligence Services and in certain instances, these monies were used to fund parallel Intelligence capacities and to achieve political ends and or to fight factional battles. These certificates of different Intelligence Services that were issued during my tenure indicate how the resources of the Intelligence Services were misused, stolen and squandered. These certificates are annexed.”

Well, they are in the documentation that you will provide to the Chair in due course hopefully sooner rather than later. You list in paragraph 149.1, 149.2 and 149.3 you list and identify the certificates for the years 2016,2017,2018, 2019 for the three Intelligence structures. That is Defence Intelligence, Crime Intelligence and the State Security Agency.

DR DINTWE: I confirmed that Chairperson.

ADV PRETORIUS SC: Alright.

CHAIRPERSON: Is the position that - I am just quickly having a look at those paragraphs, is the position that in regard to each service that falls under your jurisdiction, you have provided certificates for the same period, in terms of years, financial years?

DR DINTWE: That is correct Chairperson.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: In paragraph one...[intervene]

CHAIRPERSON: Well, maybe – I may be taking you back
10 Dr Dintwe but you mentioned under the failure of oversight over the Intelligence Services, that you include your own office, that it also failed and then you said you could give reasons you were weakened and so on. It may be that you dealt with it earlier on but I have forgotten, can you just tell me, this is why the reasons why you say your office failed?

DR DINTWE: It is because Chairperson I mean, if you get an office and you get appointed, there is an expectation that you should come up with a turnaround general
20 strategy and without deviating looking at any reasons to justify that I am glad to say that maybe we could even have pushed more than this.

CHAIRPERSON: Yes.

DR DINTWE: And I know the attitude of the Chairperson I have heard you saying, telling other people we will

normally say that, but what did you do with the little that you had?

CHAIRPERSON: Yes.

DR DINTWE: So I should not come here and say that we melt down, we have really got broken down, to me I see that as a failure of the OIGI.

CHAIRPERSON: Okay, no, no, I am glad you say that because, you know, with these problems that the Commission is looking at to face the country, we will not
10 solve them until - unless people who are leaders are prepared to look at themselves, look at their own roles and say, I know, I accept that from my side I did not do enough here and going forward, this is what I am committed to doing to make sure that yesterday or tomorrow is not the same as yesterday, you know.

If we are not prepared to do that, and if leaders are not prepared to do that people who are in positions are not prepared to do that there is not going to be a change. So I am always glad when a leader, somebody in charge does
20 not just look at what others have done wrong, but also says, have I done enough on my side and what can I do differently going forward? So I am happy that you have said that.

DR DINTWE: And then there is an example, which further elucidate that Chairperson

DR DINTWE: That is correct Chairperson but for instance, over this four years I have struggled to get information, when in fact, the oversight act criminalises a refusal by any person in decent physical services and I always, you know, wanted to regard that as a last resort. So that is – this is an example of a lapse on our side and because it does not need money, it needs me to cross the roads, the nearest police station, open a case and not wait, not write four letters before I can get one signal as an information.

10 So we should not be myopic, about the challenges facing the office we could have done more.

CHAIRPERSON: No, thank you.

ADV PRETORIUS SC: In fact, have you sought to secure your powers through Court intervention?

DR DINTWE: I have done with the litigation that I would have referred to earlier.

ADV PRETORIUS SC: In paragraph 151, on page 822, Dr Dintwe, you deal with the failure to implement the recommendations of the OIGI, you have dealt with this
20 issue in questions, in answers to questions to the Chair. You say at the bottom of paragraph 151:

“Recommendations made and reports produced by the OIGI are largely ignored by the Ministry and the Director Generals of the Intelligence Services.”

Would that comment, apply equally to the JSCI?

DR DINTWE: That is correct Chairperson, there is this legal issue that I think that maybe during the arguments, the closing arguments maybe the legal team will deal with it because if a recommendation is developed and sent to their accounting officer for implementation, can we really bemoan the failure of the implementation and place it at the door of the legislature? I think that that distinction should be made, I think that the Joint Standing Committee on Intelligence should only hold the DG's accountable, as
 10 to the extent that they fail to implement, because these other issues are administrative decisions and so forth, which are a sole preview or province of the director, Director General's. I do not know if the if that argument is raised whether it will be acceptable, but I did not want to venture into that myself.

CHAIRPERSON: Ja, no, no, that that is fine. I mean, the - one has got to look at what each body or functionary is required to do by law and did they do what they are required to do by law or what they were empowered to do
 20 but did not do.

So you look at the committee and say what is there role, what were they employed to do, what were they apply to do, what is it that they did, and what is it that they could have done and you look at there the DG's as well, if they should have pursued certain issues with DG's and they did

not then they have valid reasons for not pursuing those issues, those are the types of issues, questions that one looks at.

ADV PRETORIUS SC: And so perhaps my question was put in to general a term, as I understand, what you are saying is that the Chair has now pointed out is that many of your recommendations and reports would be directed specifically at functional officers, for example, the Ministry and the Director Generals of Intelligence Services, it would
10 be their duty to consider your reports and recommendations and where appropriate to implement.

DR DINTWE: That is correct Chairperson, I think that is what – not I think rather than to say that the majority of the recommendations will go to the accounting officers for implementation.

ADV PRETORIUS SC: Yes, but to the extent that they are not implemented an oversight body, such as yourself and the JSCI, would then come into play and be accountable for the failure to exercise oversight over the non-
20 implementation of your recommendations.

DR DINTWE: That is correct and I think that also in the spirit of legislation, you remember there is superintendence a role of the Ministers as well. So in any event, if a decision is done, I have recommended to the DG the Minister is aware of that recommendation. I think that

her role eventually in that office superintendence so she has more powers to us the DG, why are you not implementing this?

ADV PRETORIUS SC: And then in paragraph 153, you say:

“It is my submission, that it is necessary to provide appropriate enforcement mechanisms to the OIGI to ensure that its recommendations are implemented, and that the failure to do so should be visited with
10 serious penalties.”

DR DINTWE: Yes, that is that is my submission.

ADV PRETORIUS SC: As for your recommendation, the Chair will have to think about that further. Chair it is 1 o'clock.

CHAIRPERSON: I see it is 1 o'clock. Do you have an idea how much more time you need because if for example, you were to be done in 30 minutes, maybe we could delay taking lunch and then take lunch after you are finished but if it is going to be longer then we maybe could take lunch?

20 **ADV PRETORIUS SC:** I would be at least another hour and I will try my best to finish within that time.

CHAIRPERSON: Okay, no that is fine let us take the lunch adjournment then we will resume at two.

ADV PRETORIUS SC: Okay I have communicated this to the next...[intervene]

CHAIRPERSON: No that is fine, so then 3 o'clock would be - they could be here. Okay, we take the lunch adjournment, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let us continue.

ADV PRETORIUS SC: Thank you Chair. Dr Dintwe much of what follows to the conclusion of your affidavit we have dealt with albeit piecemeal and out of order already so given the
10 constraints that we have in regard to time I am going to summarise and extract what I think are important passages from your affidavit of course if I leave anything out you will take me to task on that issue and intervene.

You deal in paragraph 154 on page 822.

DR DINTWE: Yes I – may I please address the Chairperson on one point?

ADV PRETORIUS SC: Of course.

DR DINTWE: In less than a minute. I did not – I know I am surprising the evidence leader I just deliberately did not want
20 to discuss this issue with him.

CHAIRPERSON: Yes.

DR DINTWE: I want to provide the commission with the date on which the submission was signed with regard to the 26 managers.

CHAIRPERSON: Oh okay.

DR DINTWE: It just that – it is just that part.

CHAIRPERSON: Just that – okay no that is fine.

DR DINTWE: It was signed on 6 March 2021. Minister approved appointments on the 6 March 2021.

CHAIRPERSON: So...

DR DINTWE: For the 26 appointments.

CHAIRPERSON: Yes.

ADV PRETORIUS SC: What document was that?

CHAIRPERSON: So that is a submission you say. Is that
10 the submission to the Minister?

DR DINTWE: No, no it is an approval.

CHAIRPERSON: That is the actual – the approval of the appointment.

DR DINTWE: Yes that is correct.

CHAIRPERSON: Oh okay. Okay.

DR DINTWE: Yes.

CHAIRPERSON: Of the 26 managers.

DR DINTWE: Yes on 6 March but on the 26th of March something happened there.

20 **CHAIRPERSON:** Yes.

DR DINTWE: The – we have what we call a budget controller.

CHAIRPERSON: Yes.

DR DINTWE: The budget controller wrote to the Minister and the DG – the acting DG then saying that most of the

posts are not funded or were not funded so he was recommending that they should be put on hold until due diligence was completed. But that was just ...

CHAIRPERSON: Ja. Ja.

DR DINTWE: A recommendation from the budget controller. What we are sitting with it is an approval which is signed on the 6th of March.

ADV PRETORIUS SC: On the 6th of March.

DR DINTWE: 6th of March 2021.

10 **CHAIRPERSON:** The actual appointment is made by what – by – by who – by the DG but the – he must get the approval of the Minister or is it the Minister who makes the appointment?

DR DINTWE: In terms of the signatories the acting DG signs as a recommender.

CHAIRPERSON: Okay.

DR DINTWE: So – so you will have a compiler Chairperson.

CHAIRPERSON: Ja. Ja

20 **DR DINTWE:** And then you will have maybe assessed level of recommendation.

CHAIRPERSON: Recommended.

DR DINTWE: Maybe from the HR person and then you will have the acting DG then who was supposed to recommend – he did not do it he raised some concerns and then you have got an approval by the Minister dated 6 March.

CHAIRPERSON: Yes. So you say in regard to these 26 managers the acting DG did not recommend – did not sign – he had some issues?

DR DINTWE: Yes. So what he did is that he scratch both sides.

CHAIRPERSON: Ja.

DR DINTWE: And then he wrote – ja he wrote amended.

CHAIRPERSON: Ja.

DR DINTWE: So which means that in other words why do we
10 not say that he chose to – to abstain.

CHAIRPERSON: Abstain – to abstain. Ja.

DR DINTWE: Yes.

CHAIRPERSON: Ja it is like spoiling your – your ballot.

DR DINTWE: Yes. Yes. He spoilt it. He spoiled his ballot.

CHAIRPERSON: He spoilt his ballot. Okay but the – the Minister then approved but it means if I understand you correctly in approving the Minister is appointing.

DR DINTWE: Yes the people are occupying as we know.

CHAIRPERSON: Yes.

20 **DR DINTWE:** The positions.

CHAIRPERSON: Okay alright.

DR DINTWE: Yes.

CHAIRPERSON: Mr Pretorius. So you do not know what the response was to the budget controller's consent.

DR DINTWE: No we did not know that. What we know is

that the Minister upon signing that she also made comments – handwritten comments and one of the comments there was that the concerns raised by the acting DG will be discussed between herself and the DG.

CHAIRPERSON: Oh.

DR DINTWE: That is all what we know now.

CHAIRPERSON: Yes. Yes. But I would have thought that the appointing authority before he or she appoints would need to satisfy themselves whether there is budget for these
10 posts.

DR DINTWE: That is an ideal.

CHAIRPERSON: Yes.

DR DINTWE: And I think that the conclusion that I am able to draw now is that she appointed and in fact the recommendation of the budget controller was ignored.

CHAIRPERSON: Oh alright. Mr Pretorius.

ADV PRETORIUS SC: Thank you Chair. On page 822 at the bottom of the page you deal with the issue of limited access to information and you have throughout your evidence have
20 raised the issue of the – in regard to the fact that you and law enforcement agencies do not have free access to information enabling you to do your job adequately.

DR DINTWE: That is correct.

ADV PRETORIUS SC: Let alone ideally. In paragraph 154 you say:

“Members of my office and I have been allowed only restricted or managed access to information from the Director Generals and other heads of services evidenced by the protracted delays and or their lack of response to our numerous requests for information.”

Is that a fair summary of the position?

DR DINTWE: It is the summary of the – of our submission

10 Chairperson.

ADV PRETORIUS SC: And you say in paragraph 155:

“In light of the consistent constructive refusal and I will ask you what you mean by that in a moment to provide information on the part of the heads of services I have come to the conclusion that there has been a conscious move on their part to progressively and incrementally restrict or manage my access to information in order to frustrate the OIGI’s
20 Intelligence Services oversight mandate.”

Do you persist with that contention?

DR DINTWE: Yes I still stand by that contention.

ADV PRETORIUS SC: When you talk about constructive refusal what do you mean.

DR DINTWE: And I can only explain it but we borrowed that

word from a constructive dismissal in terms of the labour relations you know legislation to say that on face value you cannot say it is a dismissal but it is you know done in such a manner that it could confuse other people.

So what I mean is that in most cases we will still be given information but where there is refusal you will not get a letter which says that we will not give you that information. Let me make an example.

I will have a letter that – that will reach the
 10 commission at a later stage where I was requesting information with regard to the deployment of operatives at party political events for instance. And the letter that I got in response was to say that may you please explain how this request fall – falls under your mandate. So I had to explain back to them to say that apart from monitoring and all those other issues I also have a function called investigation which includes maladministration which includes corruption but which also includes abuse of power. Because at that stage I had received complain from one of the political parties who
 20 were saying that we do not even want this number of intelligence operatives attending our events. So – so constructive because they will not say that – we are not giving it to you but they will say explain to us how does it fit into your mandate.

ADV PRETORIUS SC: So whilst there may not always be a

direct refusal of information the conduct of the party from whom information is sought might make it clear that you are not going to get the information whatever you do.

DR DINTWE: That is correct Chairperson.

CHAIRPERSON: Well you told me last time that you are not a lawyer but constructive refusal seems also consistent with a judgment of the Supreme Court of Appeal that Mr Pretorius will probably remember where the Supreme Court of Appeal says well if a judge has given a judgment and the party who
10 lost applies for leave to appeal and that application for leave to appeal is not adjudicated for a long time it is constructive refusal of leave to appeal. So – so it has not been decided the Judge has not decided that he is refusing leave but because it is left hanging for too long it is constructive refusal of leave to appeal.

ADV PRETORIUS SC: That is some interesting example.

DR DINTWE: Yes Chairperson. Can I mention Chairperson that this is my third year of completing an undergraduate degree in law and a LLB

20 **CHAIRPERSON**: Oh that is good.

DR DINTWE: Yes. So I just decided to study that yes.

CHAIRPERSON: Oh no that is good – so good.

DR DINTWE: So I am not a lawyer but I do 00:10:56 of law.

CHAIRPERSON: Ja well I have every reason to believe you are going to pass and pass well.

DR DINTWE: Thank you Chairperson.

ADV PRETORIUS SC: We may be the opposite on the other hand.

CHAIRPERSON: One day.

ADV PRETORIUS SC: Lawyers could not con students of law. Paragraph 156 you mention that:

10 “In crime intelligence there appears to be a
reluctance on the part of the divisional
commissioner’s office to pursue disciplinary
processes against senior member implicated
in infractions.”

Is that consistent with your findings?

DR DINTWE: It is consistent with my findings Chairperson and I think that will also have submissions so affidavit in our possession where junior members says that I would have stolen this particular amount but it will just be a fraction of the amount stolen by somebody senior. And they just get you know they just dismiss them in a short sort of time so there is a pattern there and it is our observation and finding.

20 **CHAIRPERSON:** But also does it mean there seems to be a culture that ah this is small why – why are you bothering about it somebody else has taken much more. Is that part of the – of what you are saying that there is that culture with the junior members or not?

DR DINTWE: Some of them may not take that angle.

CHAIRPERSON: Okay.

DR DINTWE: In arguing they will almost admit – let us say they will confess.

CHAIRPERSON: Ja.

DR DINTWE: And say that okay I am dismissed – I am here – I have stolen but there is somebody somewhere who it is known that they would have stolen more than myself but it is not – he is not saying that he should not have been dismissed. They only say that our dismissal happened.

10 **CHAIRPERSON**: So quickly.

DR DINTWE: So quickly.

CHAIRPERSON: Ja.

DR DINTWE: If compared to senior managers.

CHAIRPERSON: Okay.

ADV PRETORIUS SC: In paragraphs 158 and 159 on page 824 you deal with your conclusion that there has been some resistance by the intelligence services and you talking there crime intelligence I understand to criminal investigation by law enforcement agencies. And you say in paragraph 159:

20 “The law enforcement agencies in particular
IPID and the DPCI that is the Hawks have
been struggling to investigate and prosecute
criminal cases of malfeasance and corruption
committed by crime intelligence officials or
committed by members of the public with the

assistance of the officials of crime intelligence.”

And you talk about investigations being stalled or delayed by amongst other things refusal to declassify documents. Is that consistent with your experience and findings?

DR DINTWE: It is consistent with our findings Chairperson without mentioning names I think that the Chairperson will be aware that there is a former head of crime intelligence who
 10 is now convicted. And there is a matter which is enrolled which happened more than ten years ago. So you ask yourself why could you not just enrol this particular matter at that particular stage. But there is something again where we get – we get approached by some of there is this other captain who comes to us and he complains – he writes we have the file and he says I may have committed this particular crime and whatever however our preference – my preference is that it is you who should investigate us. So they know that we can only make recommendations and he
 20 even went to an extent because you ask them what kind of recourse or recommendation that you are wishing for and he says that if you have those powers could you please tell IPID that they did not have powers to investigate myself because I am incriminating 00:15:23. So they get to choose between these two institutions.

ADV PRETORIUS SC: On page 824 paragraph 158 you deal with the concerted effort as you put it by management of crime intelligence to ensure that pending cases do not off the ground and avoid detection by oversight bodies. And you go so far as to say it had become clear that the implicated persons and entities enjoy the continued protection of the divisional management. You have just referred to one exception and General Lazarus and the proceedings against him would be another exception.

10 **DR DINTWE:** That will be another exception Chairperson.

ADV PRETORIUS SC: Matters were pursued against him.

DR DINTWE: That is correct.

ADV PRETORIUS SC: And of course there may be others but you deal with your findings I presume of your investigations and summarise those in paragraph 159, am I correct?

DR DINTWE: You are correct.

ADV PRETORIUS SC: Right. And you then go on in paragraph 160 on page 824 and following to deal with in
20 general terms the refusal of intelligence services to declassify information that relates to suspicious transactions or criminality and you have given examples and you have stated that on a few occasions in your evidence. But for example in paragraph 161 you deal with the contention that it would be palpably wrong for intelligence services to hide

behind classification of documents in instances of suspicion of criminality. Procurement issues for example need not be regarded as secret and if there are secret elements they could be redacted, am I correct?

DR DINTWE: You are – you are correct.

ADV PRETORIUS SC: Issues relating to safe houses and I am told by you that many of those issues are contained in documents which are refused declassification. How could that be dealt with?

- 10 **DR DINTWE:** That is correct there is another case that we were involved in and I think it is one of the enrolled matters now where one of the senior managers traded in his own personal vehicle there was a shortfall so he used the monies from a service from a particular service to pay for that particular shortfall and this case could not be concluded. The investigation was concluded long time ago but they could not prosecute merely because that administrative part was classified also and it has always been hidden under information that on face value one may think that it is
- 20 intelligence and it is not intelligence at all – it is a pure criminality and theft of state funds.

ADV PRETORIUS SC: And in relation to safe houses I think you suggested in consultation that one could just redact the address of that.

DR DINTWE: You could do that. In the documents that I will

be submitted or that are in my bundle Chairperson which is not in front of us now is that I make an example of them purchasing groceries from one of the supermarkets that we all go to and they classify that particular submission. Instead of just removing the house number and the address where these things will be taken to because it is a safe house yes.

ADV PRETORIUS SC: A safe house. Then in paragraph 163 you deal with the mis-document and that document as I
 10 understand it adopted by cabinet on 4 December 1996 is available on the internet.

DR DINTWE: It is available and it – they only write or wrote restricted. Now restricted documents are not necessarily classified documents.

ADV PRETORIUS SC: In any event you say in paragraph
 163

“The mis-document deals with classification and declassification of information. Of particular relevance to the issue at hand as
 20 paragraph 3 of the mis-document which sets out guidelines on the procedure for classification and the declassification of classified documents.”

And insofar as it is necessary we can deal with that in submissions to you Chair.

“The mis-document provides an explanation on classification documents and in particular paragraph 3.4 gives an injunction that security measures are not intended and should not be applied to cover up maladministration, corruption, criminal action etcetera or to protect individuals/officials involved in such cases.”

The point about that is that the mis-document
 10 precludes classification in categories far wider than just corruption and criminal action. It includes mis-maladministration and I think regulation 3 of the Security Services document goes so far as to say that classification cannot be used to preclude or prevent embarrassment to officials. Words to that effect I may not have the precise words but the point I – as I have – understand from mis is that classification is precluded or prevented or prohibited in broader range of cases than simple corruption and criminal.

DR DINTWE: I confirm that that is our proposition
 20 Chairperson.

ADV PRETORIUS SC: And you say in paragraph 165

“The mis-document enjoins the head of an institution to test on a regular basis classification of documents generated in the institution and further provides that over

classification of documents must be guarded against.”

It seems that the point that is made there is the duty to manage classification as an on-going duty. It is not as if a document once classified it remains classified forever. Is that correct?

DR DINTWE: That is correct Chairperson and maybe one should hasten to add that what is a secret today may no longer – may not be a secret two weeks or two months to
10 come you know. So that is why it enjoins the head of services to keep on testing or retesting and identifying those that – those issues that should remain classified and those that need to be declassified.

ADV PRETORIUS SC: And in paragraph 167 you refer to the judgment of the constitutional court in the Independent newspaper versus Minister for intelligence case where the Deputy Chief Justice Moseneke laid down several factors to be considered when the disclosure of classified documents is being dealt with and he lists there a number of factors that
20 must be considered when a document which is formerly classified is sought to be declassified.

DR DINTWE: That is still our submission Chairperson.

ADV PRETORIUS SC: And you say in any event in paragraph 170 it has been said that members of IPID as is the case with members of the OIGI have security clearance

to the level of top secret.

So there would be no reason for refusing classified documents to you. The law prohibits that anyway but to IPID. They have security clearance anyway as I understand.

DR DINTWE: They do have that Chairperson. There are often some internal arrangements such as if one of the investigators is still waiting for the re-vetting and so forth that they remove them from cases of that – of that nature. But they are always alive to the requirement that only people
10 with top secret should access these documents in crime intelligence environment. I think that is now happening also with the investigative directorate. It is also happening with the Hawks as well to say that if you are waiting please step aside for a while until you are re-vetted.

ADV PRETORIUS SC: Right. And then in paragraph 171 you put before the Chair several examples of the mis-use or overuse of classification. For example a case involving the procurement of blinds and curtains by crime intelligence officials. Any reason why those documents should be
20 classified?

DR DINTWE: They should not have been classified at all. The matter is yet to be prosecuted because we have got the Centurion case number and the prosecutors could not proceed with that – with that issue. Ten or so yes that is actually 2013 matter.

ADV PRETORIUS SC: Ja and that is because of over-classification of documents.

DR DINTWE: That is correct Chairperson it is over-classification because it is purchasing of blinds; of curtains.

ADV PRETORIUS SC: In any event you have given examples and you have spoken already of examples in relation to procurement of IT Solutions and the like. They are there for the record.

CHAIRPERSON: So knowledge of curtains that were bought
10 is a threat to National Security.

DR DINTWE: It cannot – my argument is that it is the delivery thereof which becomes a National Security issue.

CHAIRPERSON: To a particular house.

DR DINTWE: Place – house yes.

CHAIRPERSON: But not the actual purchase of curtains.

DR DINTWE: Yes.

CHAIRPERSON: Ja.

DR DINTWE: Chairperson I do not know if I am dealing with it but I save to say a critical issue. We have been dealing
20 with a case where the management of crime intelligence decided to buy PPE for Covid – now I am talking masks, sanitizers and all of those sort of things and they decided to use what we call Secret Service account. Now they have got two accounts the other one they call it open account the other one they call secret service account and you ask

yourself because secret service account is used for cover operations. So where do you buy those because from where we are sitting as and when you go and buy them it is – it could be issued to anybody. What you have to worry about is that after the purchase who do you issue to and that is the level at which you should start protecting the identity of the recipients. But you should not be using the secret account to purchase – to purchase those things. It is happening 00:28:07.

- 10 **ADV PRETORIUS SC:** Understood. At paragraph 172 you deal and that is on page 829 you deal with a – quite an ironic situation and that is where the law enforcement agencies are saying in relation to criminality, misconduct and the like only you as the officer of IGI have jurisdiction. That seems rather strange in the context of the evidence you have given. Could you explain the problems attached to that approach?

- DR DINTWE:** Let me explain that and – yes and it is a finding of the Mokgoro Commission where we have letters
20 that were written by seasoned and very senior prosecutors to our office to say that this and that other issue it is – it falls under your exclusive jurisdiction. The police can never ever you know investigate a particular matter and I think that the Justice Mokgoro would have made a finding on it and it led to the removal of two of the senior – very senior prosecutors.

So that is an example of that absurdity where people say that it is only you because I think that they – they have reconciled themselves with the fact that this office is so weakened that nothing will happen.

ADV PRETORIUS SC: Yes and you have restricted powers anyway. You have no powers to prosecute.

DR DINTWE: I cannot prosecute.

ADV PRETORIUS SC: Or be disciplined. You have recommendation powers only.

10 **DR DINTWE:** That is correct, Chairperson.

ADV PRETORIUS SC: Obviously investigative powers but ultimately powers of recommendation. So do I understand it correctly, as you put it in paragraph 173, that:

“In encountering the investigation efforts by IPID and the Hawks an argument is routinely profit that these law enforcement agencies do not have a legal mandate to investigate any conduct of criminality, fraud or malfeasance of persons within Crime Intelligence.

20 This argument is profit on the basis that the OITI has exclusive jurisdiction over the Intelligence Service. In bolstering this argument that has consistently been maintained that the OITI is the body that is legally mandated to have access to classified

information of crime intelligence...”

So do I understand it correctly that when it comes to prosecution of criminal acts, fraud and corruption within the State Security Agency, the response of some law enforcement officials is: We have no jurisdiction. Go to the IGI. Is that correct?

DR DINTWE: That is correct. And Chairperson, this has led at a particular point where I convened what we called – we used the word *trapper(?) tide(?)*, *supper(?) tide*
10 workshop. [Speaker not clear] We sat around the table because ...[indistinct] kept on using a term – they were referring to us as a clearing house. So whenever I picked an investigator approaches them and say that I am investigating this particular matter, they will say that but the OIGI is our clearing house.

In other words, they were giving me powers to decide which information to be given. They said: No, no, no. We can provide the information but only subject to you going to an OIGI instead of you getting it directly from us.

20 **ADV PRETORIUS SC**: And what was your response to that?

DR DINTWE: I said that we cannot be regarded(?) with that and there were a lot of deliberations. We then made resolution about that issue. They withdrew(?) in that meeting, the usage of the concept and we signed those

minutes. They are part and parcel of the documents that I would have submitted to the Commission.

ADV PRETORIUS SC: Right. You were told by IPID, and you relate this in paragraph 174, that this view that only the IPI can deal with the issue of criminality, fraud or malfeasance within Crime Intelligence, that this view was relied upon in the investigation of the criminal charges against the former Divisional Commissioner, General Mduli during or about 2011. Is that correct? Can you confirm
10 that?

DR DINTWE: I confirm that, Chairperson.

ADV PRETORIUS SC: And you say it has been raised frequently during your tenure.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And in response to what you have just told the Chair about the use of your offices as a clearing house for declassification which you have resisted. Clearly, the duties will lie elsewhere. Documents must be declassified at the Lord Chester and if they no
20 longer deserve classification.

In paragraph 177, you say that:

“In 2018 IPID approached the Minister of Police Minister Cele for his intervention who referred the matter to the OIGI for our comments regarding the possible impact of the

declassification of documents in question to national security...”

In my letter dated 5 April 2018, is that letter you refer to?

DR DINTWE: That is correct. That is the letter that I referred to, yes.

ADV PRETORIUS SC: Addressed to the minister. It will be in your documents.

10 “I indicated that in instances of suspicion of criminality involving classified documents, the Divisional Commissioner and/or the National Commissioner were duty bound to reconsider earlier classification of documents.

Moreover, Crime Intelligence should, as a general rule, be inclined in favourable classification of documents in order to rely for proper and unhindered criminal investigation and possible criminal
20 prosecution...”

So as I understand your position that the duty to monitor classification and to declassify documents were appropriate, cannot be roistered upon your office.

DR DINTWE: That is my submission. That is correct, Chairperson.

ADV PRETORIUS SC: In paragraph 182, it seems that the JSCI became quite active in summoning you to appear before it. What was the issue you were required to explain?

DR DINTWE: Which paragraph is that?

ADV PRETORIUS SC: 182. Concerning the leakage of information. Just read the paragraph and tell the Chair, please, what point you are making there.

DR DINTWE: Alright. Now there was a stage that General
10 Jacobs wrote to Parliament and he titled(?) about a complaint against the OIGI. There were several complaints. The first one, he was complaining that I was threatening him. There was a letter that I – that he thought it was a threat. And secondly, that the information I our possession would find itself, you know, somewhere else.

And in this instance, if I have to be specific, is that they were part of my certificate that were sent to the National Anti-Corruption Hotline of the Public Service Commission and I was called to come and account and
20 explain whether it was not my office that would have leaked that information. I have no business leaking information to that because I have clear reporting lines. So I do not need to do that.

ADV PRETORIUS SC: Okay. But anyway, there the JSCI was active in calling you to account.

DR DINTWE: That is correct. And my explanation was accepted.

ADV PRETORIUS SC: Alright.

DR DINTWE: And the allegations were seeing as being unsubstantiated.

ADV PRETORIUS SC: Alright. Then in paragraph 183, on page 833 you deal with quite an important topic, really. And that is the role of the Auditor General in relation to the audit reports of Intelligence Services. And you say in
10 paragraph 184:

“In the audit reports of the Intelligence Services, the Attorney General of South Africa has always had to provide qualified audits owing to its inability to access certain areas of the Intelligence Services that were deemed to be sensitive for access by the AGSA...”

And you end the paragraph by saying:

20 “After protracted meetings with all stakeholders including the JSCI, it was agreed that the Officer of the Inspector General of Intelligence should assist the Auditor General of South Africa in the auditing process of the Intelligence Services and in this manner provide some kind of combined audit assurance...”

If you could tell the Chair, please, what is the problem here about auditing the Intelligence Services and whether the Officer of the Inspector General of Intelligence can usefully play a role, what has been tried, what works, what does not work.

If you could just tell the Chair that, please. You had come to some conclusions in paragraph 187 as to really a method that was tried to deal with the problem of security of information on the one hand and the need to
10 audit on the other.

DR DINTWE: Firstly Chairperson, this amount to a legislative difficulty because the Auditor General is mandated in terms of the founding legislation. We are mandated with that. In our legislation the Oversight Act, we are not given auditing mandate of function and if you like, whether you differentiate it between financial auditing performance, audit and all those other things. We do not have any business to do that kind of work.

But maybe let us ask ourselves. If I had to do
20 that particular work, to which report was going to belong(?)? Because the Auditor General will write their own report and we actually write what we call certificate. We report to different authorities in Parliament or committees, if you like, but the most important thing is that we do not even have auditing capacity.

I am not an auditor myself. I do not have an auditor in my office and I do not see even Treasury allowing us to recruit auditors because by legislation we do not have that particular, you know, mandate.

But the problem about it, about this practise called Combined Audit Assurance is that there was a sort of an agreement before my arrival where the Auditor General's Office will then give the so-called working documents to our staff members but it is obvious that they
10 will really, really conduct what is called a box ticking exercise because they did not even understand, they cannot even get deeper into this particular issue.

So it was really giving or creating lots and lots of problems. One of those being that the Intelligence Services had even reached an agreement, I do not know how, with Auditor General but before you even start auditing us you can qualify us already or disclaimer or, you know, in terms of what they called slush funds in the SSA or what they call secret service account and they are
20 taking about 10% of the budget allocated to those agents.

So it is the bulk of the money and they created deliberately so a blind spot for the Auditor General. So it was only ourselves who could go there and I have to admit today that I do not think that we really had capacity to audit that particular portion of the budget.

ADV PRETORIUS SC: So that very category of funds that you have investigated and shown to be the source of much corruption and blatant looting and theft, as you put it, is concealed from the Auditor General. Is that right?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And of course, it stands to reason, as I think you said elsewhere, that monies would be allocated to those sectors of the SSA operations precisely to conceal, to keep them away from auditing processes.

10 **DR DINTWE:** That is correct, Chairperson.

ADV PRETORIUS SC: You say then in paragraph 187, notwithstanding that and notwithstanding the lack of skills and experience and expertise in the audit process, your office has observed that there was large scale flouting of rules and legal prescripts by the Intelligence Services. It was observed that chaos and maladministration thrived and you say that in paragraph 187.

DR DINTWE: I confirm that, Chairperson. So when I see that we did not have an auditing function, I did not mean
20 that we did not book into their books. We looked into their books but we call it something else. It is oversight but we do look at their books. So you will see that this area albeit you know a blind spot to the answer(?) but there is a lot happening as far as those portions of the budget were concerned.

ADV PRETORIUS SC: And you say in paragraph 187 that the IGI certificates, those are your reports to various instances, have included in them a list of suspicious financial transactions and these have been reported to the ministers, the JSCI and the relevant heads of the Intelligence Services. Is that correct?

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: And you give one instance here where certain of these financial irregularities in your view
10 were also reported to the current President while he was still the Deputy President.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: We will deal with that matter in due course but having said that. There must obviously be some balance between secrecy on the one hand and the need for proper financial auditing on the other. Quite how that problem is to be solved is a matter that the Chair may consider. But do you have any comment in the solution to that issue?

20 **DR DINTWE:** I do have a comment and maybe let me use an analogy of a tale which works a dock(?). The other way around and tell you about this meeting that was convened by the JSCI Chairperson there. And the Auditor General that is the late Thembekile Kimi Makwetu was there. I was there, representing this office and then there were people

from the CFO's, most importantly, that were sitting there.

And the SSA had gone to do a benchmark with the other countries. Their interest was to establish how do these other countries deal with the auditing of the Intelligence Services and they made recommendations. That is the reason why the meeting was called, to say that we have to also make inputs.

Chairperson, I never go to Cape Town and I did not utter a word. This is the only meeting that I went and I
10 never uttered a word in that meeting. I only introduced myself and I never uttered anything because I was very much surprised that an intelligence service will go do a benchmark, approach a Committee of Parliament and the oversight bodies and tell them that this is how we would like to be audited and they will be using a particular jurisdiction.

It is a country that I will not mention with a name, you know, by a name but literature and your OECD reports and other transparency, international and all those
20 other things, they would have rated that country as number one most corrupt country in Africa. Now there they – and said that: Oh, you have got a nice model. From this particular country. You know in this country, Auditor General do not get involved in the auditing of this particular, you know, Intelligence Services.

And the reasons why I did not utter a word, it is because I would have caucused between myself and Makwetu to say that I feel so much defeated and I do not want to be seen as somebody who is resisting this kind of arrangement. And it was himself who then recommended that:

You will know I – I hope that you know that we cannot move an inch before there is a legislative amendment. So he explained eloquently to them. So there
10 was no reason for me to do that. That is why I am saying it is an analogy of a tale which work the dock, not the other way around.

And I think this led to a lot of you know malfeasance against increased(?) it because the services had an audacity to tell us as oversight body and a parliamentary committee how they should be audited, how they should be held accountable.

ADV PRETORIUS SC: Alright. Is this document, this benchmarking report, available?

20 **DR DINTWE:** I beg your pardon?

ADV PRETORIUS SC: The benchmarking report that you spoke of.

DR DINTWE: Well, it was not my document. It was not given to me. I never even bothered to request that document. So I do not have it. It is not there in the

bundle that I have provided.

ADV PRETORIUS SC: I could be wrong. You mentioned that there might be international literature available on how internationally and acceptable intelligence services are audited.

DR DINTWE: No, no I was referring to something else.

ADV PRETORIUS SC: Alright.

DR DINTWE: I was saying that the country that was being fed of the model that was preferred, that country has been
10 ranked as you know number one by literature and some research conducted by, for example, transparency international.

ADV PRETORIUS SC: It was another comment you made that we can pursue that in due course.

DR DINTWE: Yes, yes.

ADV PRETORIUS SC: In paragraph 188, you draw a conclusion arising out of the latter part of your affidavit. You say:

20 “The covert nature of the intelligence environment makes oversight of the Intelligence Services crucial.

In order for there to be effective oversight over the Intelligence Services, it is necessary that OIGI be entirely distinct from the SSA and be funded separately from it, had full access to

all information and documentation and be granted powers of enforcements.

It is also essential that such services be fully audited by the Auditor General and that there be proper consequent management...”

Presuming you mean consequence management.

“This includes not only that disciplinary steps be taken by those implicated but that law enforcement agencies are supported by
10 declassifying documents required for prosecution...”

Is that your conclusion in respect of most, if not all, of your evidence?

DR DINTWE: That is my conclusion, Chairperson. And my wish is that it is understood again in the context that I would have raised earlier to say that we have hope. We did not only come here to assist the Commission. We also have hope that maybe this Commission would be different from all other commissions.

20 It is the first commission that has a rule which says that the information gathered here may be used for prosecution. I think that is a novelty as far as this Commission is concerned. So in my conclusion, I am saying that this rot should not be allowed to happen again in future and we hope that, as I mentioned there, that there

will be proper consequent management now moving forward.

I personally will not be a beneficiary of this. I will be out of this office on the 15th of March 2022 but I will be the happiest man if my successor will reap the rewards if there are any in terms of strengthening this oversight mechanism which is very much crucial in the Intelligence space.

ADV PRETORIUS SC: Chair, it is necessary to deal just
10 very briefly, hopefully, with a few matters that have arisen
...[intervenes]

CHAIRPERSON: Ja.

ADV PRETORIUS SC: ...since Dr Dintwe last gave evidence.

CHAIRPERSON: H'm?

ADV PRETORIUS SC: The first I have dealt with and that is the company and the director of the company, Ivani, that was involved in procurement. They have presented a version. That can only be given to you or given to the
20 Chair for publication, at least, once certain procedures have been gone through and perhaps we can do that in writing and due course.

The second is that there have been certain media statements by Mr Bongo. I am not going to deal with the evidence given through the media. It matters what be

raised before the Commission, they must be raised directly.

Then Mr Arthur Fraser has given a response to your evidence. That document is not before the Chair yet but again, it may be necessary to obtain written responses. They are not being ignored.

Then I have an affidavit from “Danny” and he was involved in the vetting security clearance of Mr Nxasana and he gives a version that differs from your version in some respects and I want to put that version to
 10 you in summary form. It is a long affidavit and it will be put before the Chair.

He says that around October 2013, he was instructed by the then director General to commence a vetting process of Mr Nxasana who had been appointed as the National Director of Public Prosecutions. And he says there was a vetting field investigator appointed, a unit head initiated a polygraph examination, and the polygraph examiner found that the subject that Mr Nxasana was being truthful.

20 She was of the opinion that the subject qualified for top secret clearance. And in this phase, the vetting evaluator made a recommendation that a security clearance be issued. So that process, that initial process in October 2013 and the months that followed, recommended that each step that the clearance be

granted.

He then says the file was handed over the Vetting Evaluation Divisional Head and upon consideration of all the relevant information contained in the file, the recommendation that a security clearance be issued was confirmed. Alright.

The file then gets to “Danny”. “Danny” says:

“On consideration of the information provided, there were no compelling reasons which could influence him not to make the recommendation that the security clearance be issued...”

And he, in fact, made a recommendation that security clearance of top secret category be granted. So each step in the vetting process resulted in a recommendation and there are several steps that security clearance be granted. But what happened then is that “Danny” took the file to Mr Ntombela, the then Director for the domestic branch and “Danny” advised of the recommendations that Mr Nxasana be issued with a top security clearance for five years.

What Mr Ntombela then did was he challenged the recommendation and findings and indicated that he, that is Mr Ntombela, had information, and this he told to “Danny”, that Mr Nxasana was involved in a murder case which was still pending. Right? “Danny” then retorted. He

said:

“Having regard to the information collected and the necessary investigations done, there was no evidence of information which implicated Mr Nxasana in the allegations made...”

And the person who was alleged by Mr Ntombela, and this was told to “Danny”, to have made these allegations was Mr Thulani Dlomo. So it appears
10 from what “Danny” says, at least, that Mr Thulani Dlomo reported something to Mr Ntombela and Mr Ntombela, on the strength of that, said no security clearance despite the process that had preceded it.

It was at that stage that Mr Ntombela said: Well, go and contact Mr Dlomo. He is based in Kwazulu-Natal. He is the relevant information who has information regarding this murder case or alleged murder case. “Danny” then said he appointed a new field investigator to conduct it on the basis that the original – that field
20 investigator had already submitted a report and was therefore... [Speaker’s voice drops – unclear]

He then says a meeting was held with Mr Dlomo in order to confirm the information received from Mr Ntombela. And he says Contrary to the information provided by Mr Ntombela – and I am paraphrasing the

affidavit – Dlomo did not provide any information relating to the alleged murder case. Dlomo advised that they approach the police where the case was handled.

So it seems that somewhere along the line incorrect information had influenced the decision of Mr Ntombela not to grant the security clearance. You have a different version and I will come to the difference in due course. So the further investigations were conducted and the field investigator indicated that no information was
10 found which implicated Mr Nxasana as per the allegations of Mr Ntombela.

So the process was renewed or continued or restarted, whatever – however you wish to describe it, but there was no basis found for any refusal of a security clearance for Mr Nxasana. So “Danny” then makes a second recommendation on his version to Mr Ntombela, that a top security clearance be issued as – and again I am paraphrasing: There was no information or evidence which indicated that Mr Nxasana should not be granted this
20 certificate since these new allegations could not be verified.

Nevertheless, says “Danny” in his affidavit, Mr Ntombela decided not to grant the security clearance to Mr Nxasana. “Danny’s” comment is that the decision not to grant the security clearance to Mr Nxasana was informed

by the facts at their disposal.

And he goes on to say that he denies, however, that he was involved in the decision to deny Mr Nxasana security clearance. In fact he says he was dumbfounded when he learned through the news on TV that Mr Nxasana had been denied proper security clearance and we know that Mr Nxasana later appealed the decision and he was granted security clearance.

Now the difference between his version and your
10 version is firstly that Danny says he was not involved in refusing a security clearance, he had nothing to do with it, he merely investigated, further conducted the further process and he came to that conclusion. That is the first thing that he says.

The second thing that he says is the record is indeed available, he says that that record is with SSA with all the records and it seems to be corroborated by the fact that he goes into a lot of detail.

And thirdly, and importantly, he says that there was
20 no first certificate that was somehow withdrawn, that there was no certificate at all, there was only the refusal by Mr Ntombela after all the recommendations were made and the reversal of that refusal on appeal.

Now I have summarised the different versions. From the point of view of the Commission, these

allegations are as serious as the allegations you made but what do you say in regard to those differences that I have highlighted to you. Was Danny involved? Is the record available and thirdly, was there a first certificate issued and then disregarded in favour of settlement process?

DR DINTWE: Chairperson, I had an opportunity to go and refresh my mind again because I received – I was made aware of this particular affidavit.

First point, in my evidence I have never said that
 10 Danny refused the security clearance, I said that the process was completed but then he recalled the file and allocated it to somebody else. So in fact you are saying the same thing, it is only that I think that we are only differing with regard to at what stage did he intervene. But he did intervene and he is confirming it. I am confirming it as well.

So I have never said that he would have refused. Anyway, he does not have powers to refuse because it get signed by the DG especially for such senior people. So Mr
 20 Nxasana is so senior that an expectation will be that it will be sent by DG and not anybody. By that time Danny was a general manager for that, but that is one point.

The second point with regard to the timeframes, I have got difficulty there because he does not tell us on what date was security clearance given. My version is that

it was issued on the 6 March and ...[intervenes]

ADV PRETORIUS SC: What year? 2014?

DR DINTWE: 2014, yes. Now if you take that date and you go through the information that we have just received, albeit not complete, you will realise that there will be entries beyond the 6 March and that can only suggest one thing and one thing only that the investigation with regard to Mr Nxasana continued beyond him getting the security clearance.

10 We cannot say that the process was whether stopped or whatever or whatever but the legislation which deals with the appointment of the NDPP says that he cannot resume his duties until that process is finalised. So if he had provided the date exactly when this thing was restarted and when it was consequently, you know, finalised, we will then be able to see that Mr Nxasana would not have been allowed to start with that particular process.

 At least, the third point, the name of Thulani Dlomo
20 is mentioned. I did not say that Mr Thulani Dlomo was involved in refusing, I said that the investigator was sent to him to get the names of the people in Kwazulu-Natal that could assist with that particular process. That is what I said.

 The last point, it is very strange that a DG will

refuse to sign. That is actually – it is a pure administrative matter. This file would have passed through a committee, an adjudication committee. The reason why they sent it to there, it is because they want to remove that human element so that if I am hated by the Director General, he is not given an opportunity to be a sole decision-maker. So my take is that once it has passed this committee, it is as good as being accepted and issued.

ADV PRETORIUS SC: Right, I understand.

- 10 **DR DINTWE:** I do not see where I am differing with Danny if there are any differences it could be about the dates and at what stage did [inaudible – speaking simultaneously]

ADV PRETORIUS SC: And it may be the issue of whether a certificate was actually signed by the Director General rather than all the processes being concluded to the point where for all intents and purposes the certificate ought to have been granted.

DR DINTWE: I beg your pardon again, sorry?

- ADV PRETORIUS SC:** So it may be – what Danny says is
20 that no certificate was granted in the sense that it was signed by the Director General and actually issued to him and then taken away or the decision reversed? You seem to be saying that that could be correct but not in the sense that all the administrative procedures had been concluded in favour of the granting of a certificate.

DR DINTWE: That could be correct because even if it is correct I do not see a conflict between what I am saying and what he is saying so that here we could be talking about two different dates but the activity itself took place and we are both confirming that.

ADV PRETORIUS SC: So Danny may say the rubber stamp at the end of the process was not there, you are saying everything leading up to that required the issue of a certificate.

10 **DR DINTWE:** That is what I am saying, Chairperson.

ADV PRETORIUS SC: But it seems that both Danny and yourself are very clear that the process and its culmination resulted in an outcome that was not justified.

DR DINTWE: That is correct, at least now that I had an opportunity to look at that particular affidavit, we are both saying the same thing again in that regard.

ADV PRETORIUS SC: And that the Chair will look at in relation to other evidence involving Mr Nxasana and we do not need to go into that here.

20 **DR DINTWE:** That is correct, Chairperson, but maybe I should also mention to say that his version about the availability of the documents ...[intervenes]

ADV PRETORIUS SC: Yes, that is the last issue.

DR DINTWE: Ja, at the time that I was conducting this monitoring or investigation, if you like, Danny was out of

the system. So there was an acting person. He has since returned, that is the reason why we are using a pseudo name, he has since returned but he has returned after I had conducted that and there is a written report from an acting personnel or the personnel manager who says that we could not locate at least a physical file of Mr Nxasana. I will be very happy – if he had to cross-examine me on that I think I have got to concede to say that you found it, I did not find it.

10 **ADV PRETORIUS SC:** So you are saying that the unavailability or loss of the records was for a particular period when Danny was not in office?

DR DINTWE: That is correct.

ADV PRETORIUS SC: Yes, he himself refers to a period when he was out of office in his affidavit.

DR DINTWE: That is correct, Chairperson.

ADV PRETORIUS SC: Alright, just one last question, if I may, and that is in relation to PAN1, Principal Agent Network. That report, the summary of that report, do you
20 have it?

DR DINTWE: I do have the summary of that report, Chairperson.

ADV PRETORIUS SC: Do you feel that you can legitimately give it to the Commission?

DR DINTWE: I suspect that it will be in the documents

that I can give.

ADV PRETORIUS SC: Alright.

DR DINTWE: And look, it is my document, it is our document, I was told declassify, we have got the power to put any restrictions if we want to [inaudible – speaking simultaneously]

ADV PRETORIUS SC: These are events over a decade ago, there is controversy over whether they have been properly dealt with, there are allegations of criminality or
10 maladministration, at least, there does not seem from our point of view at least any reason for the continued classification of that document.

DR DINTWE: As I said earlier that certain issues graduate out of national security, I mean, but if you say that you have to investigate further criminally and charge person A, what is secret about that?

ADV PRETORIUS SC: Yes. And then finally, if I may just ask you, were you present at any stage where the PAN1 report was presented to any ministerial or other official?

20 **DR DINTWE:** I was not present, Chairperson.

ADV PRETORIUS SC: Alright. Thank you, Chair, those are the questions.

CHAIRPERSON: Thank you very much, Dr Dintwe, for availing yourself to assist the Commission, we appreciate it very much. Thank you very much, you will ensure that you

give us what you may give us lawfully. Okay, thank you very much, you are now excused. We are going to adjourn for about ten minutes to enable the next work stream to set up but we will continue on Friday with witnesses connected with SSA.

ADV PRETORIUS SC: Yes, Chair, thank you.

CHAIRPERSON: Yes, thank you, we adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

10 **CHAIRPERSON:** Good afternoon Mr Myburgh, good afternoon everybody.

ADV MYBURGH SC: Good afternoon Chairperson.

CHAIRPERSON: Are we ready?

ADV MYBURGH SC: Yes we are.

CHAIRPERSON: Okay, Mr Gama the oath you took yesterday will continue to apply today.

MR GAMA: Thank you.

CHAIRPERSON: Thank you, okay, Mr Myburgh.

ADV MYBURGH SC: Thank you Chairperson, good
20 afternoon Mr Gama.

MR GAMA: Good afternoon Mr Myburgh.

ADV MYBURGH SC: I was at the point yesterday of taking you through Mr Singh's version in relation to the 100 locomotives. I would like to just finish off on that if I may I think I have taken you to one paragraph in one of his

affidavits, I would like to take you to a few others. Could I ask you please to turn to Exhibit BB23, Bundle 5C, and could I ask you please, Mr Gama, to turn to page 1464, one, four, six, four.

Perhaps, I could just ask you to direct your attention to paragraph 151. Mr Singh says:

“Moreover, M&S go on a frolic of its own when it states that the 20E locomotive proposed by CSR required significant modification and could thus not have met the requirement of urgency. In this regard, the following should be noted, Sub 1, the memorandum at all material times contemplated that CSR would be supplying a 21E locomotive and not the 20E. Sub 2, Mitsui had experienced significant problems with the 19E and 15E locomotives, procured by Transnet on a previous occasion via a confinement process.”

Can I just ask you to comment on that please, those two point?

20 **MR GAMA:** I think he is correct.

ADV MYBURGH SC: And then at 152:

“Importantly, at the time, Sub 1, my confidence levels in Mitsui, being able to meet its proposed very aggressive delivery schedule was low due to the following.”

First point:

“The history of the 110, 19E locomotives described above was a problem for me.”

Next point:

“This delivery schedule also contained many conditions that needed to be met to achieve it, such as subcontract acceptance.”

Next point:

10 “The proposal required the use of existing parts of 19E locomotives to enable the aggressive delivery schedule to be met.”

And next point:

“This meant that additional risks will be introduced into the coal locomotive fleet that was already under resourced.”

You want to comment on that?

MR GAMA: Yeah, I could comment on 1524 and indeed, Mitsui had proposed that they would use existing parts of the 19E so if those parts ran out means also there was a risk in terms of the pricing, and that they have given us 20 that it would actually change and increase. So that particular one, I think it is in my knowledge, the other two are in Mr Singh's knowledge.

ADV MYBURGH SC: You have a comment on the others?

MR GAMA: I have no comment.

ADV MYBURGH SC: And then 153 says:

“That due to the above factors, I did not believe that the Mitsui option would actually result in locomotives being delivered as planned and their proposal and mitigated the risks to the MDS volumes.”

Do you are to comment on that?

MR GAMA: Well, I think the confinement had started as early as February of 2013 and I think as time went by, we
10 all know that the people who have got a better ability to accelerate locomotive delivery is actually the Chinese locomotive manufacturers, they have proven time and time, again that they can do that quicker. So it is probably true that they would not have been delivered on timeously, even the timeframe that actually expired since the confinement had initially been motored.

ADV MYBURGH SC: Now as I understood from your evidence yesterday, at least at the time, when you presented the business case you had confidence in Mitsui.
20 I think you said with the benefit of hindsight things might have changed.

MR GAMA: I had confidence in the locomotive. I had confidence in their locomotive and it is it had already been delivered and it was in operation but from that time, there were a lot of post commissioning teething problems that

arose afterwards with the Mitsui locomotive. So here 153 talks specifically to delivery schedules.

ADV MYBURGH SC: Alright, if I could then take you please, to some aspects of the Fundudzi Report on the 100 locomotives. Could you turn Exhibit BB27. I just wanted to ask your comment, if I could ask you please to turn to page 127.

MR GAMA: 127?

ADV MYBURGH SC: 127, and if I could direct your
10 attention Mr Gama, can I just ask you to clarify one or two things. At page 127 go to paragraph 5.6.8.16 I think it is, the third last paragraph. It is apparent from the text that Fundudzi asked certain questions of you and you provided a written response. With regard to that paragraph it says in his written response:

“Gama indicated that the technical and operational specifications and requirements of the 100 locomotives were carefully and cogently deliberated and agreed upon with the end user.”

20 What did what did you mean by that?

MR GAMA: Are they talking about the 100 locomotives?

ADV MYBURGH SC: Yes, this relates to the 100.

MR GAMA: Yeah, I indicated to you yesterday that after the approval by the BADC we then put together technical teams that worked with CSR to agree on the technical

requirements and to create a prototype, that is what it means.

ADV MYBURGH SC: Alright, so in other words, what you are talking about there is post approval?

MR GAMA: That is correct, yes.

ADV MYBURGH SC: Could I then ask you please to go to the top of page 128.

10 “In his response, Gama further indicated that the decision to confine the procurement of 100 locomotives to CSR, was extensively debated and considered upon and was arrived at after rational consideration of all the financial, technical, operational, legal, and compliance related facts.”

MR GAMA: Yeah, I have had occasion to request through you the report or the responses that Fundudzi talks about or what I do want to say to you at the outset is that a whole lot of these quotations when taken out of context, and when they are not read with the totality and the actual memo that I had sent to them they will send you on a frolic
20 of sorts because they can be taken out of context.

So I want you to be aware of that and to note it, because it was when I read the document, that I could see that they were quite conservative in terms of the quotation they quoted those elements, which if you looked at the entire text that they had been looking at, it would give you

a very different picture.

So it is not something that you should rely on without looking at the text of the document. So then coming back to this one it is true that the confinement of the locomotives was extensively debated, as you know, it was initially to Mitsui.

We spent even more time on Mitsui, the CSR matter was an after the decision issue when the decision had been taken, and we then had to say a decision is taken
10 how do we make sure that we will operationalise the division? And that is really what this means.

ADV MYBURGH SC: Alright, well I raised it only with you, because it appeared to me to be different to the evidence that you gave yesterday. But again, if as I understand it, you saying it relates more to what you did after the decision was taken.

MR GAMA: That is correct.

ADV MYBURGH SC: And it is the same answer that you gave in relation to Sub 16?

20 **MR GAMA:** Yes.

ADV MYBURGH SC: And then...[intervenes]

CHAIRPERSON: Hang on one second Mr Myburgh. Do you still have that memo or the response that you gave to Fundudzi because...[intervene]

MR GAMA: I did request a memo, it is also interesting

when they say Gama this, Gama that.

CHAIRPERSON: H'm.

MR GAMA: In the memo, and I qualified in the name, I said, I am not going to talk about the actions of individuals, in terms of what different individuals did, you must go and ask individuals about their issues. But I am saying from a Transnet perspective, what were the issues, I did obtain that memo, and I think I obtained it from through the Commission.

10 So I think we would be able to, yeah.

CHAIRPERSON: But okay, but no, I raised it because on the face of it to I also like Mr Myburgh think when I read this it does not - it seems to be different from what you said yesterday about the CSR the decision to confine to CSR. But can I find out this?

 Do you agree that this on its own without reading the entire memo, namely, what is quoted in the first paragraph at page 128 suggests that what you said was that you - was that the decision to confine to CSR, as
20 opposed to confined in general, irrespective of to whoever that is the decision that this says was extensively dissipated. Do you accept that that is the impression it leaves?

MR GAMA: That is the impression it leaves gives and I think I have said this yesterday to Chair. The Fundudzi

Report is crafted and in a manner and way in which it wants to get you to particular outcomes, and it is able to exclude very relevant information that would make the reader actually reach a very different vision if the information given was taken in its totality.

CHAIRPERSON: Yeah, no, no, that is fine I just wanted to make sure that we have the same understanding. So, but what you do say is what you say that when one reads the whole document that is not the impression one will get.

10 **MR GAMA:** That is correct.

CHAIRPERSON: And that is not what you intended it to say.

MR GAMA: No.

CHAIRPERSON: Okay, alright, Mr Myburgh.

ADV MYBURGH SC: Yes, thank you but Chairperson this is – I would just confirmed the memorandum or Mr Gama's responses will be something that he asked us to discover which we did. It has not found its way into the bundle, because we thought he might put it out if you wanted to
20 rely upon it. But perhaps for the sake of completeness, we can add that document into the end of the bundle.

CHAIRPERSON: Yes.

ADV MYBURGH SC: I assume we can we may even be able to do that today.

CHAIRPERSON: No, it can be done, if it is available it

can be done, that can be done anytime.

ADV MYBURGH SC: Then Mr Gama just two subsequent paragraphs:

“Contrary to Gama’s response, and you’ve already quantified that, the award of the 20 locomotives to CSR was later revised, and CSR was requested to supply 21E locomotives. As discussed below, the change from 20E to 21E resulted in increase in the price of the locomotives and amendments to the technical specifications. There is no evidence that the technical and financial implications resulting from the change in locomotives were discussed in the meeting of 24 January 2014.”

Do you want to comment on that?

MR GAMA: Ja, also, this is when somebody enters an arena that they do not understand, 20E locomotives is a GFP locomotive and we would not try to put EFP locomotives in a heavy haul line, which is the coal line. So that was never the intent. The whole issue of the 21E was always the intent.

So obviously, if somebody then went and took the GFP locomotive, which has a maximum of 22 tons per axle versus the 26 tons per axle, the price will change, it will be different, but they write here as fact, that which they do not understand and then it permeates across the Fundudzi

Report.

ADV MYBURGH SC: Alright, and then could I ask you please to – well there is a sentence that says:

“There is no evidence that the technical and financial implications resulting from the change were discussed in a meeting of 24 January.”

Are you able to comment on that?

MR GAMA: The meeting of 24th January Chairperson was described by me in my affidavit as having had a lot of what
10 one may call illogical, if not nonsensical, things that were there, it is not clear that even the people who were in the meeting understood what they were discussing. So there is not really much that one can say any further about logic. There was no logic that took place, when this particular matter was discussed, as I looked at the minutes, ja.

CHAIRPERSON: Well we spoke yesterday, briefly or I asked you a question about whether even when a matter that was to be deliberated upon by the committee related to your division, you would only be able to attend if you
20 invited...[intervene]

MR GAMA: That is correct.

CHAIRPERSON: And you said yes. So I guess that when you look at the deliberations, and you formed a view that you formed which you have just articulated from your point of view, it just shows maybe that how important it is that

maybe the head of the division should be there when the matter is dealt with that relates to them because he or she would understand issues much better than anybody else.

MR GAMA: Yes, you are quite correct I mean there were a lot of issues that are just conflated.

ADV MYBURGH SC: Thank you. Mr Gama could you then please go to page 13 and if I could ask you to have a look at paragraph 5.6.9.9 it says:

10 “According to Gama the memorandum dated 21 January 2014, confined to CSR was changed at Transnet Group and not at TFR.”

We dealt with that yesterday.

MR GAMA: Yes.

ADV MYBURGH SC: The next paragraph says:

20 “We determined that as per the procurement procedures manual version two October 2013 and 2013 ppm requirement, the end user in this case TFR, should be the one motivating the procurement process to be followed i.e. confinement or tender before the memorandum may be taken to Transnet Group for recommendation to be BADC. We determined that Gama and Gianni as the end users did not motivate for the confinement of 100 locomotives to CSR.”

Do you want to comment on that?

MR GAMA: It is true.

ADV MYBURGH SC: And then it says, I think then they go off to quote the relevant paragraph:

“We determined that paragraph 15.1.5 of the 2013 ppm states that quote, the submission for confinement must be fully motivated in writing by the end user and the division chief procurement officer, TFR, to the operation division main acquisition council and the operation divisions chief executive officer, TFR for prior written support of the recommendation to confined, the submission should be submitted on the relevant template under cover on the memo to the GCE.”

Do you want to comment on that?

MR GAMA: Yeah, so in terms of the 100 locomotives, all of those things had been followed but that was only in respect of the Mitsui confinements.

ADV MYBURGH SC: Yes.

MR GAMA: So when it came to the CSR memo that was submitted those were then it.

CHAIRPERSON: Does the view you have taken that it looks like nobody was involved in that, in those deliberations knew what they were talking about, at least in regard to some of the issues relating to this matter suggest that maybe even the committee did not have people who

have the kind of expertise and knowledge that would have enabled them to pick these things up to say, this thing does not make sense, this does not make sense and so on.

MR GAMA: It would be difficult to speculate Chair because it is one of two things, either the minutes are written badly and maybe they do not reflect what was discussed, or the minutes are written correctly and they reflect what was actually discussed, because - so it is one of those, but then it would seem to me that the happiness
10 that was there was that the confinement was no longer to Mitsui, so.

CHAIRPERSON: You see, I asked the question, because one of the issues that the Commission is going to look at is what criteria were followed in the past, in selecting people to be appointed to Boards of SOE's and what qualifications should be - what qualifications were required, and experienced, and so on, and so on. And as well as what skills and expertise and qualifications were required before somebody could be put into a particular committee, you
20 know because if you took me and put me in an IT Committee I would not know what to do.

But if you are going to put people in a Board or committee where certain technical knowledge and expertise is required, and they do not have that, then managers can do all kinds of things because they do not understand, you

know everything is above them.

So That is why I was asking the question whether you think it might reflect that this was too technical and maybe the Board Committee members or some of them maybe did not have the kind of expertise that would have enabled them to pick up that this thing does not make sense and so on.

MR GAMA: Ja, no Chair I think the matter you raised is quite pertinent and it is an important one because the
10 qualifications of the Board members that go onto this SOE, especially if you get Eskom and Transnet you need heavy technical engineering, economics and finance skills that are required in those kinds of entities.

And in order for it, you know, to succeed, so if you have a Board member who excel in Bible studies, for instance, you might find that they will be good for the Ethics Committee, but they might not be able to make input in the other aspects of the business.

CHAIRPERSON: Ja, thank you, Mr Myburgh.

20 **ADV MYBURGH SC:** Yes, thank you I just wanted to make sure that I understood your evidence in this regard Mr Gama. It is correct that you did attend the meeting of the 24th of January?

MR GAMA: It is correct, there was pressure on attendance. In my recollection, I do not recall that I was

there when this particular 100 locomotive issue was discussed because you will see that on the agenda that day was also the 10:64 and my stance is that I would have been there or called in when the 10:64 deliberation takes place.

So, in most of these meetings, and there you will come in, they will tell you that there is a meeting between 10 and 12, either at ten, or you go you sit outside for an hour, you enjoy a tea, and then at some point, and when
10 they are ready with a particular item, then they will call you in but I have no recollection of being present when the 100 locomotives was discussed.

ADV MYBURGH SC: Can I just ask – but if you could turn up Exhibit BB4A, I want to go the minutes again.

MR GAMA: BB?

CHAIRPERSON: BB4A, somebody will help you, while they are looking for a file for you, I want to ask the question. If both types of locomotives were to be discussed would it have made sense for you to leave
20 before the other one was discussed? I think you said you would have been there or you were there for the 1064.

MR GAMA: Yes.

CHAIRPERSON: But you do not remember being there when the other one was discussed. So I am just wondering whether it would have made sense for you to leave when

you knew that they were going to discuss and the other one as well.

MR GAMA: It may have been discussed before we went in for the 1064. I cannot remember the sequence of the meeting minutes when I looked at it in terms of what was discussed first. But I have been more involved on the 1064 in terms of what was being discussed on that particular day.

Remember that, I had even sent a memo the day
10 before and I was not really sure when I said no, this thing does not make sense. I was not sure that I did not know that it was even on the agenda.

CHAIRPERSON: Okay, Mr Myburgh.

ADV MYBURGH SC: Yes, I just wanted you to please turn in Exhibit BB4A to page 228, it is annexed to Mr Callard's affidavit, the minutes we looked at them yesterday briefly. You will see that these are the minutes of the meeting on 24 January, we identified that Mr Molefe and Singh were present and that you were partially in attendance, you and
20 Mr Gianni. This meeting if one has regard to the heading commenced at 11:50. If you go to the foot of the page, you see in italics, Mr Gama and Gianni joined the meeting at 11:55 minutes, five minutes afterwards.

Go through the document you will see at page 230 at paragraph 5.9 that the acquisition of the 599 electric motor –

locomotives were discussed. If you then turn forward to page 232 you will see at paragraph 5.2 the acquisition of an additional 100 Class 19E electric and 60 Class 43 diesel locomotives was discussed. And then perhaps I could ask you to turn all the way forward to page 237. You will see just above paragraph 5.6 again in italics it reflects that Messrs Gama and Jiyane were excused from the meeting at 15:03.

MR GAMA: Ja.

10 **ADV MYBURGH SC:** You want to comment on that?

MR GAMA: So I think my comments of yesterday might remain a positive – also took place a long time where I was said these are the kinds of meetings where you spoke when you were spoken to as well but I just do not recall this actual discussion about the 100.

ADV MYBURGH SC: If I could then take you back to the Fundudzi Report and this is the last thing I am going to put to you in relation to the 100 locomotives and this report. Can you turn please to page 160. There if I can direct your
20 attention to the middle of the page. It says at paragraph 5.8.29.4.

“Transnet would have saved R1.2 billion if it procured 100 locomotives from Mitsui.”

Do you have any comment on that?

MR GAMA: Ja I think it is a wrong conclusion. There were

certain assumptions I think Mr Singh's affidavit was indicating that Mitsui had priced based on assumptions that they could use certain existing parts that were in Transnet's possession.

I do not know how much exactly those were. It would need to be costed in order for – for a statement to be made. The potential saving – let us assume it was true but I am – I am just saying that the parts need to be taken into account because there is a cost to that I do not know maybe they are
10 worth 600, 800 million or 1 billion I do not know.

But when you look at these things you must also look at the total cost of ownership. The frequent taking out of locomotives for maintenance and repairs of Mitsui's actually counter products and that cost.

So you might say I am going to save some money up front if you thought you were saving it is like somebody who buys a bicycle versus somebody who buys a small VW Beetle. You save some money by buying the bicycle in the front but if you had bought the Beetle you might have been
20 safer and you might reach certain places a little bit faster. So if the total cost of ownership were to be taken into account it is unlikely that the conclusion that Fundudzi reached could be reached.

Because as I have said there were a lot of problems. In fact I think even now they are still experiencing some

problems with these Mitsui locomotives.

ADV MYBURGH SC: I would then like to address briefly the issue of the increase in the ETC of the 100 locomotives from 3.8 billion to 4.8 billion. Now we saw yesterday that the agreement was concluded on the 17th of March 2014.

MR GAMA: Okay where are we now – which bundle must we go to?

ADV MYBURGH SC: No stick – stick with that.

MR GAMA: Okay.

10 **ADV MYBURGH SC:** We will come to the relevant part in a moment. So we saw yesterday the LSA's concluded on 17 March 2014. The evidence has been that Mr Singh then requested Mr Laher to prepare a memorandum explaining why the prices had increased from the business case submission and ultimately that memorandum was produced and there is reference to it. If I could ask you to go to page 141 of the Fundudzi Report. It says there at paragraph 5.6.18.8.

20 “We determined that Molefe, Singh and Gama issued a memorandum to the board on 23 May recommending approval to increase the ETC from 3.8 billion to 4.8.”

Now it refers to Annexure B35 that you were furnished with. You will find that document in another file perhaps I could ask you to leave that document open and

then if someone can help you find Bundle BB4(f). This is Transnet Bundle 4 here. Transnet Bundle 4.

MR GAMA: BB4.

CHAIRPERSON: Mr Myburgh I am told there is 4(a) and 4(b) which one is it?

ADV MYBURGH SC: 4(b). Could you turn to page 550 that is where you will find the memo.

MR GAMA: 550.

ADV MYBURGH SC: Ja. Now let me just take you directly
10 to the last page 563.

MR GAMA: Sorry I am – page.

CHAIRPERSON: Did you say 553?

ADV MYBURGH SC: 563 Chairperson.

CHAIRPERSON: 563.

ADV MYBURGH SC: That is the signature page. Now you will see that there it records:

20 “It is recommended that and little b. the BOD approves the increase in the estimated total cost ETC for the acquisition 100 equivalent 19E dual voltage electric locomotives for the export coal line from 3.871 billion to 4.840 billion. Recommended by Mr Singh, yourself and Mr Molefe.”

You see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now this memorandum the evidence has been that for about two months from the 17th of March up until the third week or so in May – for two months Mr Laher assisted Mr Singh in putting together this memorandum. Mr Laher gave evidence that Mr Singh would in fact send him updates, changes that had to be made and Mr Laher would then type them and effect them. Would you confirm that this is the work of Mr Singh when he was the first recommender, do you confirm that?

10 **MR GAMA:** Yes it is a finance and a pricing related matter.

ADV MYBURGH SC: Ja. Now Mr Callard gave some evidence that he considered the price increase not to be justifiable. Evidence to that effect was also given by an expert Mr Chawbe. Now this is an issue that is being played out in our examination you will recall Mr Chairperson of Mr Singh because he is the author of this document. An expert report has been put up. He has filed a comprehensive affidavit etcetera. I do not want to – and you were not issued with a 3.3 in respect of Mr Chawbe's evidence. I do
20 not want to be unfair to you and take you through all of that I will just simply ask you to – to comment. There is – there has been evidence led that this increase is considered not to be justifiable. Mr Chawbe said that anything above 800 million would not be justifiable. Do you have any comment that? I mean I would accept entirely that it is a strict

financial issue.

MR GAMA: Now who is Mr Chawbe?

ADV MYBURGH SC: He was the expert who gave evidence.

MR GAMA: No I do not know. What does Mr Laher say?

ADV MYBURGH SC: I beg your pardon.

MR GAMA: What does Mr Laher say because he was working on the document? What was Mr Laher's view?

ADV MYBURGH SC: Well Mr Laher's view as I recall was that he did what Mr Singh told him to do.

10 **MR GAMA:** Oh. Not very useful. Okay no I am not able to comment on what Mr Chawbe said. I do not know him I do not know what he is an expert on.

ADV MYBURGH SC: Alright. I want then to – to turn to the procurement of the 1064 locomotives.

CHAIRPERSON: Are we going back to Bundle 6?

ADV MYBURGH SC: I am going back to Bundle 6 yes.

CHAIRPERSON: Okay.

ADV MYBURGH SC: And I want to take you to that portion of the Fundudzi Report it makes it easy to identify the core
20 facts dealing with the 1064. Can I take you please first to page 177. In fact I will start at 178. Are you there?

MR GAMA: No not yet.

ADV MYBURGH SC: Can I direct your attention please to paragraph 5.9.10 towards the foot of the page under the heading Business Case/Budget. Paragraph – first sub-

paragraph reads:

“We were provided with a copy of a business case dated 25 April 2013 titled Procurement 1064 Locomotives for the general freight business final version which outlined the need for 1064 (465 diesel and 599 electric locomotives) Annexure C25. The said business case recommended the purchase of 1064 locomotives at a total cost of 38.6 billion excluding potential effects from forex hedging, forex escalation and other price escalations as per corporate plan.”

Now that business case you find at Exhibit BB4(b).
Page 401 the annexures to Callard’s affidavit.

MR GAMA: BB4(b).

ADV MYBURGH SC: You have a lot of – a lot of flags and dividers. I think it is probably the first document or close to the beginning. It is page FQC401 Mr Gama.

MR GAMA: I got it.

20 **ADV MYBURGH SC:** Annexure FC54. You have it?

MR GAMA: Yes.

ADV MYBURGH SC: So on the first page if you go to 402 you will see there procurement of the 1064 locomotives for general freight business. Date of submission 25 April addressed to Transnet board of directors. And this is a

document that runs to 115 pages. Perhaps you could go to the end and that is at page 516. I think I have asked you already whether you recall ever signing this business case and perhaps in fairness I must mention to you that we for some reason have not been able to find the signed version. Can you recall ever signing it?

MR GAMA: No.

ADV MYBURGH SC: Alright.

MR GAMA: I have no recollection. This was the final one
10 that went to the board.

ADV MYBURGH SC: That is correct. So if we can go back to the beginning of the business case. Now I want to take you to page 405 because as you know it is this phrase excluding that has become contentious. If you look at 405 the last paragraph second sentence.

“Accordingly it is recommended that the 1064 locomotive business case be approved with estimated total costs of the acquisition of 38.6 billion as per the corporate plan
20 (excluding the potential effects from forex hedging, forex escalation and other price escalations.)”

You see that?

MR GAMA: Yes.

ADV MYBURGH SC: Then if I can ask you please to go back

to the Fundudzi Report this is at Bundle 6 you should still have it open page 177. 177 three paragraphs from the bottom.

“According to Callard the business case submitted to the board incorrectly stated that the ETC of 38.6 billion excluded forex escalation and other price escalations.”

And the next paragraph.

10 “We determined that the final business case dated 25 April 2013 submitted to the board was amended to state that the ETC of 48.6 billion excluded the potential effects from forex hedging, forex escalation and other price escalations.”

You want to comment on those two paragraphs?

MR GAMA: The – the 38.6 billion did include some – what you call it forex assumption as I understood it.

ADV MYBURGH SC: Yes.

20 **MR GAMA:** It did include some – it should have said it excluded borrowing costs because we always excluded borrowing costs and that was always determined later. But certain assumptions around foreign exchange were always made and the 38.6 was a historical number that had been developed I think even at the TFR business case was about 38 billion. It has some assumptions around foreign

exchange. But it did not have everything. It did not have borrowing costs and other things but it did include some assumptions around foreign exchange.

ADV MYBURGH SC: So you deal with this in some detail in one of your affidavits.

MR GAMA: That is correct.

ADV MYBURGH SC: Let me take you there. Exhibit BB28 Bundle 7.

CHAIRPERSON: That is Bundle 7.

10 **MR GAMA:** It is raining files today Chair.

ADV MYBURGH SC: It is I am afraid.

CHAIRPERSON: Hopefully you do not think it is all meant to confuse you.

MR GAMA: No we shall not be confused.

CHAIRPERSON: Have you got the page Mr Myburgh?

ADV MYBURGH SC: Page 250.170.

CHAIRPERSON: I just mention this while I remember. I hope that Mr Gama and his team did remember the issue of that email that we discussed yesterday.

20 **ADV MYBURGH SC:** Yes we have it and we have got it in the bundle already.

CHAIRPERSON: Okay.

ADV MYBURGH SC: We will come to that DCJ.

CHAIRPERSON: Okay alright.

ADV MYBURGH SC: So Mr Gama you deal with this in

paragraph 78.6 and what you dealing with there is the creation and the development of the business case. If you go over the page to 171 you will see 123456 lines down on the right hand side it says:

10 “On 25 April 2013 one year after we handed over the process to Group the board approved the business case for the acquisition of the 1064 locomotives at an estimated cost of R38.6 billion which excluded the potential effects from forex hedging, forex escalation and other price escalations. The aforesaid approval was premised on a memorandum dated 18 April a copy of which is annexed. You say however the recommendation to the Transnet board of directors contained in paragraph 23 of the memorandum has become the source of much speculation as to its meaning. The caption which reads and it is what found its way into the board approval ETC for the acquisition is estimated R38.6 billion as per the corporate plan (excluding potential effects from forex hedging, forex escalation and other price escalations) is ambiguous. I have dealt with the ultimate increase in the

20

contract value herein above and have made my position very clear which is that the cost components were in fact included albeit at an estimated and assumed values which proved inaccurate and with us understating.”

Is that – you stand by that?

MR GAMA: Absolutely.

ADV MYBURGH SC: Now if I could take you to the minutes of the board meeting held on the 25th of April 2013 which we
10 have already references in the Fundudzi Report. These minutes you will be assisted you find in Bundle BB4(a). Oh sorry BB4(g) I beg your pardon. Pierre it is that file. Could I ask you please to turn to page 59. You will see at page 59 that this is a minute of the special board of directors of Transnet meeting held on 25 April 2013. You will see that present were inter alia Mr Molefe, Mr Sharma and Mr Singh and there was partial attendance by yourself and Mr Peter. You see that?

MR GAMA: Yes.

20 **ADV MYBURGH SC:** Now this meeting said in terms of the heading to have started at 14:20. If you go to page 60 the next page you will see just above paragraph 4.4.3 it records that Mr Gama joined the meeting at 14:50. You see that?

MR GAMA: Yes.

ADV MYBURGH SC: And then if you go to the following

page 61 you will see right at the end that the meeting closed at 14:45.

MR GAMA: 15:45.

ADV MYBURGH SC: I beg your pardon 15:45. So on the face of it you were at that meeting for just short of an hour, is that correct:

MR GAMA: Yes.

ADV MYBURGH SC: The resolution that was adopted appears just above the heading close at page 61 and it
10 contains this sentence that we have been discussing.

“The business case for the acquisition of the 1064 locomotives for TFR’s general freight business at an estimated cost 38.6 billion as per corporate plan.”

And then the contentious piece.

“Excluding potential effects for forex hedging, forex escalation and other price escalations. The submission of PFMA application to the shareholder Minister for
20 approval.”

You see that?

MR GAMA: Yes.

ADV MYBURGH SC: And it says...

CHAIRPERSON: I am sorry Mr Myburgh I do not see that. Are you still at page 50?

ADV MYBURGH SC: I am at page 61 – the page numbers are difficult to read.

CHAIRPERSON: You know this is 61 and they have 51.

ADV MYBURGH SC: Well yes it is 51 and 61. I think the official page number Chairperson is YM61.

CHAIRPERSON: Yes okay.

ADV MYBURGH SC: If you will see it has got a line through it and then there is...

CHAIRPERSON: Yes.

10 **ADV MYBURGH SC:** Handwritten 51. I think it should actually be 61.

CHAIRPERSON: Yes. So where about on the page were you reading?

ADV MYBURGH SC: If you go to just above the heading close at the foot of the page.

CHAIRPERSON: Yes.

ADV MYBURGH SC: You go up about five lines or so you will see there is a heading resolved that the board approved the following.

20 **CHAIRPERSON:** Oh okay yes. Okay.

ADV MYBURGH SC: So what the board approved there was the business case an estimated cost of 38.6 billion and then you have the contentious phrase excluding.

CHAIRPERSON: Which was contrary to the business case document.

ADV MYBURGH SC: Yes. So Mr Gama I just want to ask you then were you present when this resolution was adopted?

MR GAMA: I think the resolution came with the – what you call it – the business case that was submitted yes.

ADV MYBURGH SC: So why did you not correct that statement?

MR GAMA: The statement is not incorrect. That is why I say it is ambiguous because a lot of people nowadays they
10 are trying to interpret what it means.

CHAIRPERSON: Well I – you will have to just speak to it a little bit more because my understanding was exactly that you were saying earlier on the business case has formulated I think at TFR made certain assumptions.

MR GAMA: Yes.

CHAIRPERSON: You make that point. But I thought you said that ...[indistinct – word cut off] even if it is not all, these things that this phrase in the minutes says: I excluded. I thought you were saying that they were
20 included at that stage. So I may have misunderstood you. So we might have to just talk to it more.

MR GAMA: Ja. No, the statement is not incorrect.

CHAIRPERSON: Ja.

MR GAMA: The statement is correct that it explaining(?) potential effects from forex hedging, forex escalation and

other prices escalation.

CHAIRPERSON: H'm?

MR GAMA: And that is why I said it is ambiguous because then to some people they think that it would have included all of the forex assumptions. There were – there was an inclusion of certain forex assumptions but not everything. So the statement in itself, as adopted by the board on that day, was not incorrect. That is why I said it is ambiguous because – and it has led to a lot of [laughs] ...[intervenes]

10 **CHAIRPERSON:** Oh, oh ...[intervenes]

MR GAMA: ...consternation because people have tried – are trying to say it was 38.6 billion. Everything that has to do with forex ...[intervenes]

CHAIRPERSON: ...into account.

MR GAMA: Ja. I am saying there was forex ...[intervenes]

CHAIRPERSON: Taking in account.

MR GAMA: ...taking into account.

20 **CHAIRPERSON:** But there was some forex not taking into account.

MR GAMA: Yes because the world changed. So let us put it a date on this because I think it is important.

CHAIRPERSON: H'm?

MR GAMA: So the date of this is the 25th of April 2013. So there is that discussion. On the Business Case, you

will see that there are certain assumptions. The assumptions are what is the Rand/Dollar spot rate, and then in there it also gives you an assumption of what is the future. What is the likely? Because this is the world of speculation. What is the likely foreign exchange? I think it says – I do not have the numbers in front of me but if we go back to that file, Mr Myburgh, where you talked about – I just want to take you very briefly to that. It is on my statement.

10 **ADV MYBURGH SC:** ...the Business Case? [Speaker unclear – microphone not switched on]

MR GAMA: Yes. To the Business Case. I think that is what will elucidate ...[intervenes]

ADV MYBURGH SC: You find that passage ...[intervenes]

MR GAMA: ...not the issues...

[Parties intervening each other – unclear]

ADV MYBURGH SC: So that is Exhibit BB-4(b).

MR GAMA: Ja.

CHAIRPERSON: Uhm ...[intervenes]

20 **ADV MYBURGH SC:** ...first document.

CHAIRPERSON: And what bundle is it?

ADV MYBURGH SC: BB-4(b).

CHAIRPERSON: Oh, okay.

ADV MYBURGH SC: Yes. Mr Callard's annexures.

CHAIRPERSON: Okay. And have we got the page or is

that the beginning?

ADV MYBURGH SC: The Business Case...[intervenes]

CHAIRPERSON: At the beginning.

ADV MYBURGH SC: ... starts at page 402.

CHAIRPERSON: Oh, okay.

MR GAMA: Okay. It will be page 435.

CHAIRPERSON: But before going there, I just wanted to go to page 405 because I know Mr Myburgh draw attention to that. I see there at the last page that says excluding
10 the potential effects from forex hedging, forex escalation and other price escalations. But you say we must go to 435?

MR GAMA: Yes. So Chair that phrase of 38.6 excluding, it is going to resonate right until the end.

CHAIRPERSON: Ja.

MR GAMA: So it is there and I am saying there is a source of ambiguity in it because there are people who have come here and said to you the foreign exchange was included and then they have given you the impression that
20 whatever calculation that would have been made on the 25th of April or the 18th of April, to be specific, because that is the date on which the Business Case had been prepared, that the actual exchange rate would remain fixed during that period. So ...[intervenes]

CHAIRPERSON: Well ...[intervenes]

MR GAMA: I do not – just want to assist the Commission in terms of ...[intervenes]

CHAIRPERSON: Yes but before you proceed. I do not think anybody thinks that they were saying the exchange rate would remain fixed. My understanding is that when you talk about what certain items having been excluded or included, my understanding is that people are talking about what was taking into account and what was not taking into account with an understanding that its estimates.

10 **MR GAMA:** Yes.

CHAIRPERSON: And there are assumptions but if you did not include in your calculations and assumptions certain items, then they say you have excluded them.

MR GAMA: H'm.

CHAIRPERSON: So I just wanted to mention that.

MR GAMA: Ja.

CHAIRPERSON: That is my understanding.

MR GAMA: Ja. No, no that is why Chair I say it is ambiguous. I think – that is why I say it is ambiguous.

20 Can I take the Chair to page 442?

CHAIRPERSON: 442?

MR GAMA: H'm.

CHAIRPERSON: Yes.

MR GAMA: At the top, it says Forex Risk Mitigation. Do you see that?

CHAIRPERSON: [No audible reply]

MR GAMA: If we – and they tried to explain what it means. If you go down to the middle of the page, there is somewhere where it says Exhibit 29.

CHAIRPERSON: Yes?

MR GAMA: And then it says the Rand/Dollar exchange rate, one Dollar is R 9,13. And then it says: A year from now it will be R 9.59. And then it goes on and it says: In year seven – year seven would be 2002, last year. In year
10 seven it would be R 12.55. So those were the assumptions what they call a forward curve that were used in the Business Case.

The assumption being in 2014 the Rand will be R 9.59, in 2015 the Rand will be R 10,00 to the Dollar. The Dollar will be R 10.52 in 2016 and that in 2017 it would be R 11,00 and that in 2017 it would be R 11.48. in 2018 it will be R 11.98.

So those were the assumptions that were used in this Business Case. What then happened – so in here is
20 included those assumptions. So it is true. In the Business Case – the Business Case says 38 billion but it includes those things that were assumed on that day. It excludes any forex escalations that are beyond their assumptions.

So it means on the day that they actually had to enter into an contract based on commitments, they are

going to use new curves, new exchange rate curves. You will know Chair that the Rand, even now as we speak, it is sitting at about R 18,80. I am not sure what it is but it is coming from around R 18,00 or R 17,00 and it has been there for quite a long time.

So there were a lot of things that happened after the Business Case to the time that the contract were then entered into. So, yes, we all agree. I am not amongst those who are saying there was no foreign exchange
10 assumption. I am saying there was foreign exchange assumption in the Business Case.

CHAIRPERSON: Ja, ja.

MR GAMA: All I am saying is that it was understated.

CHAIRPERSON: Yes, because I was about to say
...[intervenes]

MR GAMA: And the fact – and perhaps inaccurate
...[intervenes]

CHAIRPERSON: Ja.

MR GAMA: ...in a sense.

20 **CHAIRPERSON:** I was about to say. As far as the Rand/Dollar exchange is concerned, what you have been saying does not seem to me to going to inclusion or exclusion.

MR GAMA: Yes.

CHAIRPERSON: It simply goes to whether your estimates

proved to be correct or not.

MR GAMA: Yes.

CHAIRPERSON: And of course with these things it is not – you never have certainty.

MR GAMA: Yes.

CHAIRPERSON: You know, it is a certain estimate.

MR GAMA: H'm.

CHAIRPERSON: And obviously, you have to adjust when you come to the day.

10 **MR GAMA:** Yes.

CHAIRPERSON: To say what is the – what is today's rate.

MR GAMA: Yes.

CHAIRPERSON: So it seems to me that, based on what you are saying, one would not say – one would say it was included but maybe the estimation might have been lower than what it should have been.

MR GAMA: Ye, it was understated.

CHAIRPERSON: Ja.

MR GAMA: And hence, there was the effect.

20 **CHAIRPERSON:** Ja.

MR GAMA: The effect.

CHAIRPERSON: Ja.

MR GAMA: Excluding the effect ...[intervenes]

CHAIRPERSON: Ja.

MR GAMA: ...of foreign exchange hedging.

CHAIRPERSON: Yes.

MR GAMA: The word effect is important.

CHAIRPERSON: [laughs] Well ...[intervenes]

MR GAMA: So all I am saying is that ...[intervenes]

CHAIRPERSON: Ja.

MR GAMA: ...the statement in itself is not incorrect,
Chair.

CHAIRPERSON: H'm.

MR GAMA: It says the effects, because what these
10 people knew was that the numbers are likely to change but
I do not think anybody would have assumed to would have
known by how much. So you go on the assumption. So
that is really what I want to say ...[intervenes]

CHAIRPERSON: H'm. Mr Myburgh.

MR GAMA: ...based on that.

ADV MYBURGH SC: Yes, what I think that what Mr Gama
has put to you, you have shown us with reference to 442
that foreign escalation was considered in the Business
Case ...[intervenes]

20 **MR GAMA:** Yes.

ADV MYBURGH SC: ...in arriving at the figure of 38.6.
The point is that 442 does not tell you what 405 which says
that it excluded the potential effects of foreign escalation.
And the evidence is that that purpose, that preamble, that
was a – it should not change and there is evidence to the

effect that, just as I have put to you now, it is at odds with the Business Case. So Mr Gama, perhaps I can ask you to comment on that before I put something else to you.

MR GAMA: Sorry, what are you saying?

ADV MYBURGH SC: Do you want to comment on that?

MR GAMA: It may have been challenged but as I have said to you Chair, at best we are dealing with ambiguity here. I know that foreign exchange assumptions were made in the Business Case. But then there are people who
10 would then want to say to you that because they were made then it means the numbers must be fixed at 38.6 billion.

CHAIRPERSON: ...anybody says that Mr Gama.

MR GAMA: Ja.

CHAIRPERSON: Nobody says that.

MR GAMA: Ja.

CHAIRPERSON: Nobody is saying that.

MR GAMA: Ja. So they were made but at the time of the actual contract – so I have said to the Commission in the
20 past few days that there is the investment decision. So there is an investment decision. It is made at 38.6 billion excluding the potential effects. I would have probably worded it differently.

I would have said it excludes hedge purging costs and excludes - costs and leave it at that because

part of the forex is really the effects of the forex. When you enter into what we then will call the procurement decision, on that day there is a new forward curve of forex that is then used and then it means the effects - the effects is the delta between the forex curve on the date of the procurement decision versus the date of the investment decision.

So that the investment decision is 23 April 2013 or whatever the date was, close to that. And then the
 10 procurement decision is the one that is taken on the 17th of March of 2014, which is a year later.

CHAIRPERSON: H'm. Mr Myburgh.

ADV MYBURGH SC: Yes but we are not dealing with that now. We are dealing with the Business Case that is presented to the board on the 25th of April 2013 and the assumption is ...[indistinct] that.

MR GAMA: Ja. So I will repeat myself. I think we should not be dogmatic about this. The effects – to say excluding the effects. I do not think there is anything incorrect in
 20 that. The foreign exchange assumptions had been made. They were encapsulated in the actual Business Case. That was the investment decision that was made on a particular day based on the foreign exchange curve that we have discussed at 422.

Because I will then take you to the document

that I said was presented by Laher and Smit, where they then come up with a new investment curve – I mean, a foreign exchange curve.

CHAIRPERSON: When you said there was some foreign exchange that was taken into account, other foreign exchange... [Speaker's voice drops – unclear] What were you talking about?

MR GAMA: So the assumptions were of the Rand that would remain relatively strong if you look at 422 Chair. If
10 you look at the numbers.

CHAIRPERSON: H'm?

MR GAMA: Except that by 2020, the Rand/Dollar would be R 12.55.

CHAIRPERSON: Yes, I understand ...[intervenes]

MR GAMA: Yes.

CHAIRPERSON: ...that is part of ...[intervenes]

MR GAMA: Yes. So and that was taken into account.

CHAIRPERSON: Yes, on the ...[intervenes]

MR GAMA: In the ...[intervenes]

20 **CHAIRPERSON:** ...account.

[Speakers intervening each other – unclear]

MR GAMA: Ja. What was not taken into account is this delta that we then are talking about. In fact, in reality, the Rand depreciated much, much faster in real life and that then the assumptions that were made here. And that

is why it is important when you look at this, you must also then reflect on the other document that I referred to which the Treasury Team then produced on the day when the contract was actually entered into.

CHAIRPERSON: H'm.

ADV MYBURGH SC: Yes. Well, again, I just want to put to you again. What we are looking at now is the position as of 25 April 2015. Bu Mr Gama, do you not put it simply and most eloquently in your affidavit, where you say:

10 “I have made my position very clear, which is that the costs components... [And we are talking about these ones.] ...were in fact included albeit at estimated and assumed values which proved inaccurate and were thus understated...”

Is it not as simple as that?

MR GAMA: That is why I have said about six times, yes.

ADV MYBURGH SC: Right.

MR GAMA: Ja.

20 **ADV MYBURGH SC:** So they were included?

MR GAMA: Yes.

ADV MYBURGH SC: They say here that they were excluded. It is as simple as that.

MR GAMA: I am saying to you Mr Myburgh. To say excluding the potential effects is not incorrect. That is all I

am saying.

CHAIRPERSON: Are you saying that what you say in the paragraph that Mr Myburgh has read from your affidavit is the same as what they say in the minutes?

MR GAMA: Yes ...[intervenes]

CHAIRPERSON: Saying you are saying the same thing?

MR GAMA: Ja, it is not incorrect Chair. It just says as of this day things look like this but we do not know the potential effects going forward.

10 **ADV MYBURGH SC:** Alright. I would just ...[intervenes]

MR GAMA: But I know that this thing could have been worded much more eloquently. It was not worded eloquently at all.

ADV MYBURGH SC: Well, let me just take you to some of the evidence that has been led. Mr Laher and Mr Mole and Mr Callard were requested in 2018 to undertake an investigation to determine if the Business Case of 38.6 ETC included forex hedging and escalation and they found that it did. Do you agree or disagree with that evidence?

20 **MR GAMA:** No, we are in agreement with that. There is no need ...[intervenes]

CHAIRPERSON: I am sorry. You are reading from where now Mr Myburgh.

ADV MYBURGH SC: I am paraphrasing the evidence that has been given.

CHAIRPERSON: Oh, okay.

ADV MYBURGH SC: You will remember that evidence has been given, Chairperson, that in 2018 Mr Laher, Mr Mole and Mr Callard were requested to undertake an investigation to determine if the Business Case, ETC of 38.6 included forex hedging and escalation and they concluded that it did. Mr Gama does not disagree with that.

CHAIRPERSON: Ja, okay.

10 **MR GAMA:** Ja.

ADV MYBURGH SC: There has also been evidence by Dr Fine of McKinsey, who testified that the Business Case ETC of 38.6 also included, he said, hedging and escalation. You would not disagree with that?

MR GAMA: No, we do not disagree with that.

ADV MYBURGH SC: Alright. And the expert, Mr Chawde, also came to that conclusion.

MR GAMA: [No audible reply]

ADV MYBURGH SC: I take it you would not disagree with
20 that?

ADV OLDWAGE: Mr Chair, I ...[intervenes]

MR GAMA: I do not know.

ADV OLDWAGE: I have been rather patient listening to Mr Myburgh put it to Mr Gama that various other persons have said certain things. It started initially with Mr

Chawde – if my pronunciation is correct – said X, Y, Z. There is no reasoning to provide the basis upon which that testimony was proffered in the first place.

What we clearly see now is that there is a different appreciation, approach and perhaps interpretation to the concept, what was and what was not included. But to simply put to a witness: Well, somebody else said this. Without providing the context in which he said why he said that, is unfair.

10 Particularly, in the context of what we are dealing with here and that is the depreciation of the Rand. Perhaps to be fair to Mr Gama. It should be put to him on what basis, if it is contended for which I believe it is, that his testimony in this regard is not acceptable. On what basis measured against the other evidence, which is now being put to him, not in a proper context. It is not acceptable.

CHAIRPERSON: Well ...[intervenes]

ADV OLDWAGE: Be fair to Mr Gama.

20 **CHAIRPERSON:** Yes, I think that given that Mr Gama has deposed to an affidavit dealing with these issues and has expressed his views, ordinarily there should be nothing wrong with putting somebody else's view or conclusion and say: What do you say to that? But if Mr Gama says I agree because he – maybe it accords with his own view in

his affidavit, there might be no need to go to the context.

But if he says: Well, I have difficulty with that or I would like to know the context. Then it becomes important to look at the context. But it may be that initially if one puts it and he says I have no problem because he has applied his mind to it when he was deposing to his affidavit, there might be no problem.

But if he says: No, I would like context or I do not agree. Then context might become important but – so
10 that is how I would look at it. Let me hear what Mr Myburgh says.

ADV MYBURGH SC: Well, Chairperson this is not really contentious because I put this to Mr Gama and he agreed. He does not disagree with the fact that the ETC of 38.6 in fact included foreign hedging and escalation costs. He does not disagree with that. His own affidavit says that. His case is: Well, it is ambiguous and it could have been put better. But this is not contentious. He accepted that evidence.

20 **ADV OLDWAGE:** Chair ...[intervenes]

CHAIRPERSON: I think where we have a problem(?), he can put it or where something that consider contentious, let us – we will look at that.

ADV OLDWAGE: I am startled by this submission that this is not contentious when the witness said but it is

ambiguous. It is capable of more than one interpretation. Do not insist on one interpretation alone. I am telling you. There is a reason I say that it is ambiguous. How can that not be contentious with respect? It does ...[intervenes]

CHAIRPERSON: Well, remember just earlier on Mr Myburgh read mister – a passage from Mr Gama’s own affidavit and he confirmed it, he stood by it and it was in accordance, as I understood it, at least with those who said this features were included.

10 **ADV OLDWAGE:** Mr Chair, with respect. I have no difficulty with that. I settled this affidavit.

CHAIRPERSON: Yes.

ADV OLDWAGE: The position is. I – my complaint relates to what is being put to Mr Gama with reference to the testimony of other persons and he will, no doubt, understand that he has got to consider his position very carefully to simply acknowledge that it is right or wrong without knowing the context within which that evidence was given.

20 **CHAIRPERSON:** Well, let us do it this way. Mr Gama, if you are not able to say you agree or you do not agree without the context, say so and then the context can be put to you but if you know that you do not have a problem with what is put to you, you can then give your view. Okay? But if you want context, say so.

ADV OLDWAGE: Thank you, Mr Chair.

MR GAMA: Yes but perhaps I can be of assistance, Chair.

CHAIRPERSON: Yes.

MR GAMA: When Mr Myburgh started, he referred to somebody, Chobe or whatever it is.

CHAIRPERSON: Yes.

MR GAMA: And we agreed that I have not had sight of ...[intervenes]

CHAIRPERSON: Of his ...[intervenes]

10 **MR GAMA:** ...over whatever ...[intervenes]

CHAIRPERSON: Testimony ...[intervenes]

MR GAMA: ...testimony, yes.

CHAIRPERSON: Yes, okay.

MR GAMA: So what we are saying here is. It must not then be brought in because we – it is something that I have not seen. And I am not likely to have any view. I may have a view.

CHAIRPERSON: Ja.

MR GAMA: But I have not seen it. And Mr Myburgh
20 himself said when he started that he is not going to put that to me because he knows that I have not seen it, whatever it is that this Chobe or...

CHAIRPERSON: Yes. Mr Myburgh.

ADV MYBURGH SC: Yes, certainly. I am going to put to you also what Mr Molefe had to say about this because he

was questioned about this – the very same phrase but let – one of our researches will find the full passage.

CHAIRPERSON: Ja.

ADV MYBURGH SC: So that I can read it to you. I do not want to just paraphrase. Let me come back to that.

MR GAMA: Ja.

ADV MYBURGH SC: So that is the Business Case ETC. I now want to deal with the increase in that ETC. Could I ask you, please, to go to the Fundudzi Report at 183?

10 That is – I beg your pardon. Chairperson, it is Bundle 6.

CHAIRPERSON: I saw it, ja.

ADV MYBURGH SC: So it is BB-27.

CHAIRPERSON: Yes.

ADV MYBURGH SC: And if you have a look at 183, there is a heading at paragraph 5.9.12: Increase and Estimated Total Costs. It says that:

20 “Based on documentation reviewed, we have determined that on 23 May 2014, Molefe addressed the memorandum to BADEC, requesting the committee to the board and increase in the ETC for the acquisition of the 1064 Locomotives for the GFB from 38.6 billion to 54.5 billion.
The memorandum was signed by Gama, Singh and Molefe...”

And then it quotes from that. Perhaps, let us go to that memorandum. You will find it again as part of Mr Callard's annexures at BB-4(b). If I could ask you, please, to turn up page 714? You will see at page 731 that recommended by Singh and then signed by you and Mr Molefe and the recommendation is, it will be:

10 "The BADC recommends an increase in the ETC for the acquisition for the 1064 locomotives on Transnet Freight Rail's general freight business from 38.6 billion to 54.5 billion to the board of directors for approval."

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now what I have seen amongst the documents is will you accept that a similar memorandum, in I think almost identical terms, was then prepared and recommended by the three of you for the board. I can take you there. Perhaps you can leave that open for a moment.

MR GAMA: Is it – ja.

20 **ADV MYBURGH SC:** So that is to the BADC. What you find is if you could go to EXHIBIT BB8, you will find a corresponding memorandum to the board. BB8(b)1. Could you please – can you help Mr Gama turn to page 165? Red numbers, 165. You will see that this is addressed whereas the memorandum in Callard's bundle is addressed to

BADC, this is ...[intervenes]

CHAIRPERSON: One second, Mr Myburgh? It looks like there are two files and she is not sure which one you are referring to.

ADV MYBURGH SC: It is BB8(b)1 and the 2. If you will turn to page 165 please, red numbers. It is in the first divider, 165. Mr Gama, are you there?

MR GAMA: Yes.

ADV MYBURGH SC: So what you will see is that this is
10 the corresponding memo. Callard's annexure relates to the BADC, this annexure is to the board. If you go to page 182 you will see that it is the same recommendation and it is signed by the three of you. Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: And would you confirm that...

MR GAMA: Absolutely.

ADV MYBURGH SC: If it is the same memorandum?

MR GAMA: Yes.

ADV MYBURGH SC: We will come back to the contents of
20 these memos in a moment. Could I ask you please to go back to the Fundudzi report and I have taken you to paragraph 5.9.12.1 that deals with the BADC memo, we have now identified the corresponding one to the board.

MR GAMA: What page is Fundudzi?

ADV MYBURGH SC: 183.

MR GAMA: Ja.

ADV MYBURGH SC: Then there is a heading BADC Meeting of 26 May, paragraph 5.9.12.3:

“We determined that on 26 May Molefe and Singh attended a BADC meeting where the above request to increase the ETC was tabled. We determine that Gama did not attend that meeting.”

Would you confirm that?

MR GAMA: Okay, I think it is probably based on the
10 minutes.

ADV MYBURGH SC: And then if you go to the board meeting where your recommendation presumably served. Board meeting of 28 May, paragraph 5.9.12.7:

“On 28 May 2014 the board noted the reasons for the increase in the ETC and approved an increase in ETC for acquisition of 1064 locomotive with a GFB from 38.6 to 54.5.”

Now we determined that as with the BADC of 26 May 2014 Gama did not attend this board meeting and then they set
20 out who was present. Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Present in the schedule, amongst others, Mr Molefe and Mr Singh and then over the page, Mr Sharma. Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now perhaps we could – we can use either of these memos, let us use the one given that they are the same, contained in Mr Callard's annexures, page 714. At paragraph 14 – and sorry, let me ...[intervenes]

CHAIRPERSON: I am sorry, is that 714?

ADV MYBURGH SC: 714 of Callard's annexures.

CHAIRPERSON: Oh.

MR GAMA: That is BB4(b), Chairperson. Mr Gama, perhaps I should preface this with the following. Mr Laher
10 also gave evidence that this memorandum was prepared in a similar way to the one in relation to the increase in the ETC of 100 locomotives. They were prepared roughly at the same time and his evidence was the same as I have described to you and that is that after the conclusion of the LSAs and for a period of a month or two, he liaised with Mr Singh and Mr Singh, I think he even used the word, pedantic, he would provide him with the text, he would provide him with amendments and he would then type it up. Would you accept that this, as reflected, as him being the
20 first recommender is again like in relation to the 100 locomotives the work of Mr Singh?

MR GAMA: Ja, it is work of financial people.

ADV MYBURGH SC: Ja. Now if you go to paragraph 14 at page 5715, it records:

“The acquisition of the 1064 locomotives was

approved by the board of directors in April 2013 at
a cost of 38.6. This excluded the following costs.”

And amongst them are the costs of hedging and foreign
exchange. Do you see that? We have debated that issue.

MR GAMA: Yes.

ADV MYBURGH SC: And then if you go to paragraph 23
at page 717 ...[intervenes]

MR GAMA: But I think also importantly, one of the things
that I had said is that it also excluded the cost of changes
10 in economic condition.

ADV MYBURGH SC: Yes.

MR GAMA: Between the approval of the business case
and the award of the contracts which was highlighted
there, ja.

ADV MYBURGH SC: Yes, absolutely.

CHAIRPERSON: I may have missed this, Mr Myburgh and
Mr Gama, when you were elaborating or dealing with your
understanding of the phrase excluding blah, blah, blah,
that we found at page 002 or was it 05?

20 **MR GAMA:** 002, yes.

CHAIRPERSON: 002, ja, you were saying that it was
included, you said the features – you made the example of
the Forex, you said some was included or some features
were included, others were not included under Forex but I
do not think you got to talk about other items that they said

were excluded to indicate whether your view as the same in regard to the other items other than Forex.

MR GAMA: Ja. No, those things, as I said, they were all included albeit the estimation and the assumptions of the values that were put in the original business case. They were somewhat understated.

CHAIRPERSON: Ja.

MR GAMA: Because that is from the period between the time when the actual business case was made and the
10 award of the contracts.

CHAIRPERSON: Ja.

MR GAMA: Ja.

CHAIRPERSON: So what you said in respect of Forex applies to the other items as well.

MR GAMA: Correct.

CHAIRPERSON: Okay. Mr Myburgh?

ADV MYBURGH SC: Yes, if I could – so what this motivates for is an increase. Perhaps if you go to the recommendation it states it most clearly at page 731.
20 Says:

“The BADC take note that the main reasons for the increase in the ETC is due to the exclusion of the following costs.”

And first the cost of hedging and then the cost of future escalations.

MR GAMA: The cost of hedging for foreign exchange movement.

ADV MYBURGH SC: Yes.

MR GAMA: The word movement is very important.

ADV MYBURGH SC: Yes.

MR GAMA: Ja.

ADV MYBURGH SC: That was the exclusion of that and the exclusion of the cost of future inflationary increases – escalations, I beg your pardon.

10 **MR GAMA:** Yes.

ADV MYBURGH SC: And it is on that basis that it also BADC recommends an increase, is that correct?

MR GAMA: Yes and also the cost of the Transnet engineering that had been excluded in terms of their scope, ja, and then the economic conditions, the changes in economic conditions.

ADV MYBURGH SC: So you were not present at the BADC meeting or the board meeting but certainly there has been evidence and it has been put or will be put to Singh
20 and Molefe that they misrepresented the position to BADC and the board insofar as they contended that the business case, reason for the increase was that the business case excluded Forex hedging and escalation. Do you want to comment on that?

MR GAMA: No, I am unable to comment on what they

have said. I think I have said my understanding of this.

ADV MYBURGH SC: But you signed both this memo and the one to the board.

MR GAMA: That is correct, yes.

ADV MYBURGH SC: Now, Mr Gama, just dealing with the justifiability of the entries on 38.6 to 54.5, the situation is the same and perhaps more acute as it is in relation to the 100 locomotives. So perhaps I can explain it this way. Again Mr Chawde, gave evidence about this increase, an
10 expert, given that these two memos were the work of Mr Singh and it is really a financial issue. That evidence was presented to Mr Singh. Mr Singh has – Chairperson, I do not know if you have yet to see this, I do not think it has been introduced into evidence but Mr Singh has produced himself an expert who has given a contrary expert report and those things are still going to be dealt with with Mr Singh when he returns to testify the week after next.

So I do not want tax you about things and you are correct, you were not given Chawde's report, I do not want
20 to tax you about that, but is this like with the 100 locomotives an issue that you are happy to leave to be fought out there or is there any comment that you have in relation to the justifiability of this increase?

MR GAMA: The only thing that I want to say, I think it is okay for the financial people to discuss this. The only

thing that I want to say from where I see it, Chair, and which is contained in my affidavit is the following. If you go to my affidavit, page 250.174.

CHAIRPERSON: Just remind me what bundle it is or have you got it?

MR GAMA: BB28.

CHAIRPERSON: Oh, okay, okay, she has got it. Ja, what page should we go to?

MR GAMA: 250.174.

10 **CHAIRPERSON:** Okay.

MR GAMA: I have, Chair, entered, I think, into evidence, if you go to 174, 78.11 and I have said that request ...[intervenes]

CHAIRPERSON: 174 being the page and 78.11 being the paragraph?

MR GAMA: Ja, the paragraph 78.11 on page 174.

CHAIRPERSON: Ja.

MR GAMA: That a question that has arisen is how the estimated cost in the investment case, estimated 38,
20 escalated to 49.54 billion because I think those are the true numbers that must be compared. It moved from 38.6 billion to 49.54 billion and then I have said that there was a report that was given to me prior to signature of those memos that Mr Myburgh talks about. That report was from the finance negotiating team and it is entered here was

SG5 and it appears, Chair, on page 250.200.

CHAIRPERSON: Yes, I have got it.

MR GAMA: Yes, up to page 250.220. You will see, Chair, at 220 that although this one is not signed because it is – it was an electronic – it is signed by Mr Danie Smit who is the Deputy Treasurer and Mr Yusuf Laher, TFR Finance.

In this document, Chair, is what was explained to me prior to signature of that document that went to the board. So I just want to say before we rest the matter to
10 then indicate to the Chair that that is the document which then contained a breakdown of the final base costs which had moved – the base costs that moved to about 40 billion and then they then allowed all of the other escalations and it went to 49.54 billion.

So that was the contract value, 49.54 billion was the contract value which was entered into with all of the OEMs on that date of the 17 March 2014, 49.54 billion. So it had moved just over 10 billion from 38 to 49.54 billion and then what was then added to that was what is called
20 the 10% contingency which came to about 4.954 something something and then that then moved it to the 54 billion. So I am quite happy, Mr Myburgh, that you then deal with it with the finance people, but I just wanted to make sure that I entered this and indicate to you, Chair, in terms of the inputs that were given to me in terms of my signing that

particular memo to the BADC and the board.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Alright then just on this – lastly on the memo, can I just ask you please to go to page 727, it is FQC727. There are a number of ...[intervenes]

CHAIRPERSON: Sorry, is that a different bundle?

ADV MYBURGH SC: That is bundle BB4(b).

CHAIRPERSON: Have you got the page number?

ADV MYBURGH SC: 727, Chair.

10 **ADV MYBURGH SC:** Mr Gama, could I ask you to have a look at 727 and paragraph 80?

MR GAMA: Ja.

ADV MYBURGH SC: This has become a contentious issue, a hurdle rate. Paragraph 80 says:

“The updated NPV results in a positive NPV of 11.68 billion at the new hurdle rate of 15.2% and 22.71 billion at the TFR WACC of 12.6%. The NPV would become negative, R1.76 billion at the original hurdle rate of 18.56.”

20 So you see that the sums are done here on an so-called updated NPV and hurdle rate of 15.2 versus the so-called original 18.56. Do you see that? Now this again is something that is going to be dealt with with Mr Singh. Do you have any comment? The issue in contention is when the hurdle rate became effective and whether or not it is

underpinned by a policy document. Do you have any comment on that?

MR GAMA: The hurdle rates, they are issued by the finance department.

ADV MYBURGH SC: Alright.

MR GAMA: On an annual basis, so Mr Singh is the correct person to speak to.

ADV MYBURGH SC: And then there are two other issues which also featured with Mr Molefe and will with Mr Singh
10 and that is the issue of the conclusion of the LSAs before obtaining board approval. But I think you mentioned yesterday that you yourself did not sign the LSAs, they were signed by Mr Singh and Mr Molefe, is that correct?

MR GAMA: I think that is what you said that you observed that my signature was not on them, yes.

ADV MYBURGH SC: I can take you to one of the agreements if you...

MR GAMA: No, it is fine, I believe you, Mr Myburgh.

ADV MYBURGH SC: Well, it gets you off the hook. We
20 can save some time.

MR GAMA: Ja.

ADV MYBURGH SC: And then the other – another contentious issue relates to the failure to obtain ministerial approval but again I think Mr Molefe, he accepted that the obligation to do that rested on him, it did not rest on you.

Would you accept that?

MR GAMA: Ja, I accept that.

ADV MYBURGH SC: So that brings me to just one thing that I want to ask you about and that is the issue of batch pricing. You have mentioned – and we know that it was a significant contributor to the increase in the ETC. Now this is something that is dealt with in the MNS report. Perhaps I could just ask you to go there. This is bundle 6, EXHIBIT BB27, the one that contains the reports. And if I could ask
10 you to turn to page 312, please? And you see there, if I can take you to the foot of the page, paragraph 2.4.6:

“One of the significant drivers of the price increase was payment for batch price adjustment also referred to as batch pricing as a result of the splitting of the awards amongst the four bidders. Transnet’s position on the payment of extra costs for reduction in batch quantities was clearly articulated in the RFP and negotiations baseline worksheet.”

20 Next subparagraph:

“The RFP provided as follows. ‘Transnet requires flexibility in exercising options for the acquisition of the locomotives. These options may include suspending or postponing the delivery of the locomotive until a later date or changing quantities.’

The emphasised portion is this. ‘Transnet, however, does not expect to pay a price premium should it exercise any of these options.’

The next subparagraph:

“It has been subsequently argued by Messrs Gama and Laher that batch pricing was justifiable on the basis that the board had approved the recommendation to split the award amongst four OEMs. Therefore the argument they advance is
10 that the reduction in the quantities of the locomotives awarded to each of the OEM’s necessitated the OEMs to increase their prices.”

Next subparagraph:

“This justification is untenable on the grounds that Transnet adopted the position of not paying a price premium with full knowledge of the right it reserved itself in the RFP to split the award to more than one supplier the effect of which would result in lesser quantities of locomotives being awarded to the
20 OEMs. The board’s approval of the splitting of the award should not be misconstrued as authorisation to commit Transnet to batch pricing more so given the fact that the authors of the memorandum to the board did not bring it to the attention of the board that the RFP prohibited Transnet from paying a

premium for changing the locomotive quantities.”

Next subparagraph:

“Committing Transnet to batch pricing contrary to the provisions of the RFP on its own also compromised the fairness of the procurement process and constituted an irregularity because the request for proposals read together with the constitutional and legislative procurement provisions thus constituted the legally binding and enforceable framework within which tenders had to be submitted, evaluated and awarded. In amplification of the Transnet position adopted in the RFP for the non-payment of batch pricing, the negotiations baseline worksheet, price was provided ...[intervenes – word cut-off] first of the PTN Team to provide guidance specifically on batch pricing, the table below is a relevance extract of the terms of reference for negotiating batch pricing.”

Then we have the table and the commentary under that is:

“This table indicates that one of the objectives set out for the negotiating team on batch pricing was to ensure that batch pricing must be removed and the price must remain fixed as if the order is placed for the full 465 diesel and 599 electric locomotives. This position is in line with the responses MNS

Attorneys received during the interviews with some of the technical personnel at TRF mainly Messrs Callard, Pillay, Harris that the cost of procuring a smaller batch of locomotives should not have a material effect on the overall transaction as long as the smaller batch was within the 100 locomotive threshold.”

Do you want to just comment on that, I know you deal with it in your affidavit?

10 **MR GAMA:** Sorry Mr Myburgh ...[intervenes]

ADV MYBURGH SC: Do you want to comment on that?

MR GAMA: Okay you also said something ...[intervenes]

ADV MYBURGH SC: I said I think you deal with it also in your affidavit.

MR GAMA: Yes, I think dealt with it in my affidavit, I have nothing to add, other than what I have said in my affidavit.

ADV MYBURGH SC: Alright, then let's go there. Sorry, I have got myself swamped with files, just give me a
20 moment. What page are you at? So you are presumably Mr Gama in Bundle 7, Exhibit BB28? Your file.

MR GAMA: BB28.

ADV MYBURGH SC: Ja.

CHAIRPERSON: Have you found it Mr Gama?

MR GAMA: Maybe it was at the beginning of the file. I

think it could be in another affidavit.

CHAIRPERSON: H'm. Is it something your junior Mr Myburgh could look for while you continue with other questions, or not? Or you would prefer to try and deal with it now?

ADV MYBURGH SC: I am not able to find it offhand, I think I might have had in mind where Mr Gama deals at some length with the accelerated delivery schedule, I am not sure offhand, perhaps his counsel can help us as to
10 where Mr Gama – bearing in mind he filed more than one affidavit, I assume it must be, if it is here it must be in the affidavit responding to Mohamedi and Callard.

CHAIRPERSON: I intended that we would take a break at six, a ten minutes break, maybe we should take it now that might help with looking for it.

ADV MYBURGH SC: Alright, thank you.

CHAIRPERSON: Ja, shall we say ten minutes or shall we say fifteen up to six?

ADV MYBURGH SC: Fifteen Chairperson if possible yes,
20 fifteen I think would be ...[intervenes]

CHAIRPERSON: To give you more time to look, ja.

ADV MYBURGH SC: Thank you.

CHAIRPERSON: Okay.

ADV OLDWAGE: Chair if I might be of assistance, it was dealt with in – with reference to the evidence of Mr Callard

and in particular his statement.

CHAIRPERSON: Yes.

ADV OLDWAGE: And that is to be found, it commences at page ...[intervenes]

CHAIRPERSON: You understand ...[intervenes]

ADV OLDWAGE: 250.148.

CHAIRPERSON: Do you want to start with the bundle, what bundle it is?

ADV OLDWAGE: It is BB28.

10 **CHAIRPERSON:** BB28.

ADV OLDWAGE: Indeed, page 250.148, that's where we commence dealing with Mr Callard's ...[intervenes]

CHAIRPERSON: 2508?

ADV OLDWAGE: 250.148

CHAIRPERSON: 250.158.

ADV OLDWAGE: 250.148.

CHAIRPERSON: 148. Yes that is where it starts.

ADV OLDWAGE: Indeed.

20 **CHAIRPERSON:** Okay, do you have the specific part where he deals with it or shall we take the break and then it will be easier to find it?

ADV OLDWAGE: I will find it for you shortly, but I don't want to waste your time Mr Chair, if a short adjournment is appropriate we would appreciate that.

CHAIRPERSON: Yes, well okay let's take the normal

break we were going to take then, fifteen minutes and then we come back.

We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let's continue. Sorry the aircon noise, they will attend to it, okay.

ADV MYBURGH SC: Mr Gama do you want to comment on the issue of batch pricing?

10 **MR GAMA:** Thank you Mr Myburgh. Before the break Chair we ...[intervenes]

CHAIRPERSON: We were looking for that part in the affidavit that gives the ...[intervenes]

MR GAMA: Yes, so if we start at page 250.166 and we go to paragraph 72.1.

CHAIRPERSON: Okay.

MR GAMA: Let's go to line 1, 2, 3, 4, let's start with the 5th line where it reads that:

20 "an anomaly contained in Callard's email of 26 March 2018 is the allegation that Transnet overpaid in the region of R10billion for the 1064 acquisition. As this version is somewhat contradicted by the later allegation in the same email of Callard's where he records that the 49billion price tag was arrived at because four OEM's had been contracted for the

supply of the locomotives instead of two. Neither an overpayment is not established to have occurred at least on Callard's version."

The issue Chair of splitting the award I think MNS agrees that splitting the award, postponing it, all of that it was provided for in the RFP, and that the Board being the entity that approved the RFP could also vary the RFP. I know that when the negotiating teams went to negotiate and if an ordinary ...[indistinct] came, if I wanted to buy 12 000 tons
10 of something they will say 12 000 tons you can pay 350, I am just making an example, per ton, but if somebody comes and says no I want to buy 100 ton they will tell you it's 500 per ton, it is just an ordinary rule of discount pricing, when people buy in bulk and people don't buy in bulk and they know that the – when that decision was made to split to two each so people will say look you're going to pay 600 of these things, now you are telling me that you are only going to buy 300 and they refused to stick to the original price, or the price did go up as a result of that but
20 it was a strategic decision that was taken and then in the document that I referred you to Chair, that Laher and Smith did the reconciliation.

It contained all of this financial transactions and it showed the pro's and cons of each in some detail, which then came to the pricing that it came to, so there were

certain savings on certain things because for instance there was acceleration etcetera and there were certain higher costs but at the end in terms of their detailed breakdown that they indicated yes you do pay more if you pay lesser quantities, but I don't think we should fault the teams, the negotiating teams in terms of that, because I know that they tried but they couldn't hold the same price with lower quantities.

ADV MYBURGH SC: So Mr Gama I perhaps just want to
10 put this to you for your comment, the problem that allowing the OEM's to increase their prices at the negotiation stage could result in their bid prices increasing beyond those of the unsuccessful bidders, that's really the problem and that is certainly the evidence of Mr Laher.

So in other words you split the batches, the prices then went up, this happens during the negotiations stage.

MR GAMA: Yes, so everybody would have increased the prices, these ones were now short-listed because their prices were lower already than the other ones so even if
20 they then went up, even with the other ones, those higher prices would have gone up even higher, so there is no prejudice that you suffer when you're negotiating with a lower price supplier versus a higher price supplier, and I don't think that the numbers were you know were big significant sort of numbers but I do know that the supplier

did refuse to stick to the original price when the quantities were reduced.

ADV MYBURGH SC: Right do you have anything further to add to that?

MR GAMA: Let me see. The final thing Chair that one needs to – because you get MNS and Fundudzi they become experts after the fact and sometimes what is not taken into account is what happened in the negotiation and I think if we just turn to page 250.172 at paragraph 78.9
10 and sorry, we turn over the page to page 173, in the middle of the page after dealing with the ...[indistinct] I indicate Chair that in addition there was an independent review of the processes.

CHAIRPERSON: That is in the middle of the first paragraph at page 173.

MR GAMA: At 173 yes in the middle of the first paragraph. It says:

“In addition there was an independent review of the processes by a high value tender audit team.”

20 And they have annexed a copy of a report, which says an example of the contract award report of that team, of the high value team, which demonstrates their satisfactory assessment of the process and in particular they provide an audit trail to support any changes from the initial business case, and to obtain that satisfactory assessment

the results of real time assurance at each stage of the Gateway review must indicate sufficient or full compliance to the actual team methodology and/or the procurement procedures manual to mitigate and manage potential risks to which the process is exposed.

There ought not to be any non-compliance witnesses, there must be compliance with statutes and regulations and the team must have been fully engaged in order for the ...[indistinct] team to express an opinion, so
10 as executives we would rely on such reports which confirm that all due processes had been followed and that in particular any changes from the initial business case were investigated and supported by means of an audit trail, so I think that is also an important safeguard that is there where you have independent teams so when somebody says there was batch pricing and it changed you can go back to the ...[indistinct] team, they are independent and you can ask them as well, and I don't know whether any of those have actually been asked to come here just to relate
20 how that process works because people just say there was a deviation of this and this and that, but it is as if this was just happening in a vacuum that there was no safeguards that had been put in place in order to look at this, so I think it is just also an important aspect Chair to deal with but I take the point that the – if there is reliance on the

financials as the numbers changed when people then tell you that no the escalation is – and the rand depreciation and there is still price change to so much those were dealt with by the Treasury and Finance teams.

Thank you Chair.

ADV MYBURGH SC: Right Mr Gama I would like now to turn to the last locomotive topic thankfully, and that relates to the relocation in particular of CNR South Africa from Pretoria to Durban. Now this is dealt with as you know by
10 Mr Gonsalves, can I ask you perhaps just to pick out his file, that is Exhibit BB5, you do deal with it in your affidavit and I will come back to that. Right, you have BB5?

MR GAMA: Ja, the page number?

ADV MYBURGH SC: Well perhaps you can just go to the first page. What I am going to try and do Mr Gama, I have got these topics that I still have to deal with, I am going to try and summarise or the background at least, and then get to what I want to deal with. What Mr Gonsalves affidavit reflects from a broad overview is that on the 11th of March
20 2014 CNR submits an initial costing of 9.7million for the relocation, we then see on the 25th of April 2014 CNR concludes a business development service agreement with Becks, with the project benchmark being 580million. In July 2015 a costing of R647million was submitted to Transnet and ultimately you agreed in signing the variation

order on the 23rd of July 2015 and the net effect of this then was that Becks was a commission of R67million. We have been through this affidavit, would you accept that broad outline?

I suppose the important thing is your signature of the variation order, let me take you to that document, that you find at page 261, that is where you become directly involved. You see at 261 you write to CNR Rolling Stock South Africa and it is headed variation order to finalise the
10 relocation, the construction of the 233 Class 45-E locomotives by CNR Rolling Stock South Africa, who ...[indistinct] facility in Durban and then you say in the middle of the page:

“Accepted variation order is as follows, EFR Class 45D locomotives supplied in Durban variation order for an amount of R647 181 494.”

And then after that it sets out the payment terms, do you see that?

MR GAMA: Yes.

20 **ADV MYBURGH SC:** And you sign this on the 23rd of July 205.

MR GAMA: Yes.

ADV MYBURGH SC: Now we do have a short set of documents that are contained in your bundle, perhaps I could take you to them and those documents you find

towards the end of your exhibit 28, at page 250.401, and the documents start with a memorandum and what we have is there seems to be two signature pages, at 404 there is a signature on the 9th of June 2015 and then at 405 there appears to be another undated signature where there is a handwritten annotation, is that your handwriting at 250.405?

MR GAMA: That is correct yes.

ADV MYBURGH SC: So which of these two pages then
10 would be the official page, for want of a better description, would it be 405?

MR GAMA: When you say the official page ...[intervenes]

ADV MYBURGH SC: Well in the sense that there's two pages, the one is signed and dated by you, the other is signed and not dated and then there is an annotation, I am not trying to make an issue of it I just want to know would one read them together or is 405 with the annotation.

MR GAMA: No, no let me help you there.

ADV MYBURGH SC: Sure.

20 **MR GAMA:** The – as I understand it I think the issues may be exactly the same.

ADV MYBURGH SC: Yes, no certainly.

MR GAMA: The one of 405 I made some comments.

ADV MYBURGH SC: Oh I see, so 405 relates to BT?

MR GAMA: It is an earlier version.

ADV MYBURGH SC: Okay.

MR GAMA: Where I say to the team how does this relate to the delegation by the Board for me to deal with this, as there is no reference to it in this memo, and the I also say to them does this apply to both BT and CNR.

ADV MYBURGH SC: Okay.

MR GAMA: So if an earlier version, it is in May of 2015.

ADV MYBURGH SC: Okay.

MR GAMA: And that is when the team is coming to me to
10 say look please approve the final team to negotiate the relocation.

ADV MYBURGH SC: Yes.

MR GAMA: And they tell me who the people are, and they are saying when we negotiate up to a maximum of this number can we go and negotiate.

ADV MYBURGH SC: Okay so I understand what you are saying, so 405 is an earlier version.

MR GAMA: Yes.

ADV MYBURGH SC: And 404 was then the one that you
20 signed later.

MR GAMA: I find that in June but there is another one that I signed as the formal approval.

ADV MYBURGH SC: Yes I ...[intervenes]

MR GAMA: After they come back and they say we have now negotiated.

ADV MYBURGH SC: Can I just ask you just to read into the record if you don't mind your handwritten annotation at 405.

MR GAMA: It says I need clarity on one, does this apply to both CNR and BT, number two, the amount referred to 635 is still under negotiation with a question mark.

CHAIRPERSON: 635million?

MR GAMA: 635million ja, and then three, how does this relate to the delegation by the ADC/Board for me to deal
10 with this matter as there is no reference to it in this manner, or approved on the basis that the limit in three is not exceeded and I am informed of the final negotiation outcome, so this was to approve that the negotiating team goes in and have further discussions with them.

CHAIRPERSON: With the – would it be correct that probably you first sign and then it occurred to you that you needed clarification of certain matters and that is why you make those notes because otherwise you wouldn't sign ...[intervenes]

20 **MR GAMA:** No you always sign, you always sign, you can say either approved or not approved.

CHAIRPERSON: Oh, so I thought maybe if you are not approving or this one it says approved, or not approved, it is not clear what you were saying.

MR GAMA: Ja so I say to them it is approved on the basis

that the amount in three is not exceeded and I am informed of the final negotiation outcomes.

CHAIRPERSON: But it was implied that they would need to come back to you?

MR GAMA: That is correct yes.

CHAIRPERSON: Ja, so they couldn't take your signature and go somewhere and say this has been approved.

MR GAMA: No, no, no.

CHAIRPERSON: Ja, so from that point of view it is not
10 finally approved.

MR GAMA: It is not finally approved, but it is an approval of the negotiating team that they can go and negotiate.

CHAIRPERSON: Ja, okay, alright.

ADV MYBURGH SC: And then if you can go back to 404, so subsequently on the 9th of June 2015 you approved of a recommendation that reads:

“Request the Group Chief Executive to approve the following;

20 [a] The team to negotiate the relocation to Durban with CNR;

[b] Variation order in order to finalise the relocation of the programme for the construction of 233 Class 45-E locomotives to Durban to a maximum value of

R696 784 286, separate submission has to be prepared or has been prepared for BT; and

[c] Letter to be issued to CNR to commence negotiation for the relocation of the programme.

Is that correct?

MR GAMA: Yes, that is correct.

ADV MYBURGH SC: So that is in 9 June. I want to then
10 take you ...[intervenes]

MR GAMA: So this one unfortunately I don't see a date, I am not sure which one came before the other, but I think later on we will make a comparison of them.

ADV MYBURGH SC: Right, what you see then at page 406, 350.406, is an email from Mr Pita on the 20th of June.

CHAIRPERSON: On what page?

ADV MYBURGH SC: 250.406.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Mr Pita was the Chief Financial
20 Officer is that correct?

MR GAMA: Not on that date.

ADV MYBURGH SC: Okay. What was his position then?

MR GAMA: On that date he was the Group Chief Supply Chain Officer.

ADV MYBURGH SC: And you have seen this email, I

mean what he sets out, received a proposal and he raises a number of queries, is that correct?

MR GAMA: Yes.

ADV MYBURGH SC: So for example in the 4th paragraph he says get a list of suppliers they are using in Gauteng and total material they expect from them, as they say they're moving 1.3million material but it doesn't make sense because they don't have many suppliers set up as yet, per my info. And he raises a number of issues along
10 those lines, correct?

MR GAMA: Ja.

ADV MYBURGH SC: And he in this email if you go for example over the page at 407, he says at the top Yusuf to check the assumptions, the last paragraph Yusuf to check financial – finance costing, do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: That I assume was Yusuf Laher?

MR GAMA: Yes, right.

ADV MYBURGH SC: Then what we see ...[intervenes]

20 **CHAIRPERSON:** Try not lower your voice Mr Gama, try not lower your voice, so that whatever you ...[intervenes]

MR GAMA: Am I too far?

CHAIRPERSON: I think your voice went lower.

MR GAMA: Oh sorry.

CHAIRPERSON: Yes Mr Myburgh?

ADV MYBURGH SC: Alright, and then at 408 the next day Mr Laher responds, the second half of the page, from Yusuf Laher on 21 June 2015, he says:

“Dear all,

My comments as follows.”

And he lists 18 issues, do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: And he questions really in 18 respects the price that has been submitted. He raises a
10 number of queries.

CHAIRPERSON: Yes.

ADV MYBURGH SC: Let’s take one for example, increasing the team size does not make sense considering the learning curve will mitigate this requirement in a short time. Two, negotiating with suppliers will eliminate the inflationary costs related to the four different ...[indistinct] etcetera, do you agree with that?

MR GAMA: Ja, I note it, I see it yes.

ADV MYBURGH SC: Alright. And then if you go to page
20 410 you will see towards the bottom of the page that there’s an email to *inter alia* Mr Laher and it says:

“Please find attached revised CNR proposal.”

And then in the middle of the page on the 25th of June Mr Laher responds and says:

“Hi Lindiwe,

Their proposal has not changed from the previous submission except for their new offer on payment terms. As such the comments per my email over the weekend still apply.”

Do you see that?

MR GAMA: I see that.

ADV MYBURGH SC: That is on the 25th of June, if I could then ask you to turn to page 250.412, it is 25 June, then Gary Pita on the 10th of July sends an email to Lindiwe and
10 the second paragraph says, right at the bottom of the page:

“Can I ask that you update all the documentation, ie memo, for us to send to the Acting GCE for approval of the CNR DT proposal and letter from GCE to CNR and DT accepting proposals in order to save time. Should the team ...[indistinct] be happy with the proposal we can then effect sign off quickly. Please also ensure that the TIS sign-off from Emma is included in the memo.”

20 Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now just ...[intervenes]

MR GAMA: I think also what you should say to the Chair is that all of this communication that you are asking me to see and note is between the negotiating team members.

ADV MYBURGH SC: Yes. Alright, well in fact I was going to get to that because I see that some of these emails are copied to Mr Singh, you see in fact at this very page, 250.412, that email is cc'd to him.

MR GAMA: Yes.

ADV MYBURGH SC: Was he a member of the negotiating team?

MR GAMA: Yes.

ADV MYBURGH SC: And we see at 250.4.1.10 also the
10 bottom email was also sent to Mr Singh. Correct?

MR GAMA: Yes.

ADV MYBURGH SC: Then what we have in chronological order is the next memorandum to you that you find at page 250.415 and this you signed on the 23rd of July 2015, that you find at 250.418, is that correct?

MR GAMA: Yes.

ADV MYBURGH SC: And that – that memorandum relates to – to Bombardier Transport.

MR GAMA: That is correct yes.

20 **ADV MYBURGH SC:** You get a similar memorandum if you page a little bit further at 250.419 you get a similar memorandum in relation to CNR. There you see the signature 23 July 2015 you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Requesting the recommendation – the

acting Group Chief Executive to note the final outcome of the negotiation for the relocation to Durban with CNR approved variation order and the amount there is 647 million. You see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now it does appear that CNR concludes a business development service agreement with BECS and the money flows have or will provide evidence that BECS is a Gupta linked company. Did you know
10 anything about this business development supply agreement?

MR GAMA: No.

ADV MYBURGH SC: And do you accept that ultimately BECS was paid an amount of some 67 million?

MR GAMA: Ja I have never seen the actual report Mr Goncalves or I do not know how to say his name I think it is Goncalves or Goncalves he did come to say to me that there was this anomaly that there were people that had been paid to negotiate this relocation and that is when I then – we had
20 Werksmans doing investigations within Transnet at that time so I also asked them to look into this particular matter as well but unfortunately I have never received the final report on that but I did ask that it be investigated. So if you say there was an amount that you have seen somewhere I am not in a position to deny or confirm it. But Mr Goncalves

raised it with me very sharply in a meeting.

ADV MYBURGH SC: Alright well the evidence that the money flows team will lead is that BECS was paid I assume this is including VAT some 76 million and of this 62 million was paid to a number of so called first level laundering entities. Do you have any comment on that?

MR GAMA: No. I do not know anything about it ja.

ADV MYBURGH SC: Do you know of any involvement by BECS – do you know of anything that they may have done to
10 secure this variation order and this amount?

MR GAMA: No I do not know them – I do not who they are. I was told by Mr Goncalves that they were these people. I do not know whether they even met with my negotiating team of they were working for CNR I am – I do not know who they are.

ADV MYBURGH SC: How is that the negotiations were conducted in such a way that it would allow for a commission of this size 67 million?

MR GAMA: You asking me? I do not know.

20 **ADV MYBURGH SC:** Or are you surprised by the fact that there was that amount?

MR GAMA: I was – I was very surprised I mean I was very, very surprised.

ADV MYBURGH SC: So Mr Gama do I understand from what you say in your affidavit that you relied on the people who

put – reports to you and recommendations made to you
yourself did you know of Mr Laher's concerns?

MR GAMA: Mr?

ADV MYBURGH SC: Laher's concerns.

MR GAMA: No I did not know.

ADV MYBURGH SC: Did you know of Mr Peter's concerns?

MR GAMA: No I did not know.

ADV MYBURGH SC: Have you got any idea how those
concerns were resolved?

10 **MR GAMA:** No. I do not know how they were resolved. I
am – I see that Mr Laher was not a signatory to the
documents – the negotiation documents but Mr Peter was.

ADV MYBURGH SC: Yes.

MR GAMA: So but all of these memos that you have read to
me I have only known about them because of the
commission. So you have sent me these documents. I was
not aware of their existence prior to that.

ADV MYBURGH SC: Alright then can I take you – you deal
with this in your affidavit perhaps you can address that if you
20 would like to. Go to your Exhibit 28 and turn up page 146.

MR GAMA: Perhaps before we do that.

ADV MYBURGH SC: Yes.

MR GAMA: Just as a matter of – of record so that there is
clarity on it. The – the memos that I sign on the 23rd of July
that you referred to one is for CNR and the other one is for

BT which is Bombardier. So what is really in front of me on that day is the amount of 618 million which is for BT and an amount of 647 million well that is the maximum values of 647 million for CNR. So for the approval you are doing a comparison of the two in terms of relocation and thinking they look very close to one another. That is really what is in my mind at the time when one is signing that particular document. But also you have a team of five negotiators that have been busy with this for more than a year by the Chair

10 because you come to July 2015 they say they started the negotiations in 2014. So that is what is at my mind so I just want to record that at this point before we continue. Yes Mr Myburgh.

ADV MYBURGH SC: Perhaps I could ask you just to go to the POI Bundle the one with the reports in. Bundle 6 Exhibit 27. MNS deal with this in a so called relocation report. Could I just take you please to page 427.

CHAIRPERSON: That is Bundle 6?

ADV MYBURGH SC: Bundle 6 Chairperson yes.

20 **CHAIRPERSON:** 42?

ADV MYBURGH SC: 427. At paragraph 2.8 I just want to – to get your comment on it. There it says:

“The Transnet personnel had constituted the relocation negotiating team were – and it lists six people including Singh and Peter.”

Does that accord with your recollection?

MR GAMA: Yes those are the people who signed the memo.

ADV MYBURGH SC: Then I had said I would take you to your affidavit. You deal with this at page 146. That is at the beginning of Exhibit 28. Not 250.146 but 146. And this is in response to Mr Molefe and deal with this at some – some length running from page

MR GAMA: It starts at age 146.

ADV MYBURGH SC: Ja in fact I – on the right hand side
10 yes.

MR GAMA: Yes.

ADV MYBURGH SC: Running through to I think it is 154.

MR GAMA: Yes.

ADV MYBURGH SC: And you end off actually by referring to Mr Laher's concerns which you say you had no knowledge of. Is there anything in particular that you would like to deal with in these pages?

MR GAMA: Maybe just a high level.

ADV MYBURGH SC: Yes.

20 **MR GAMA:** I am not going to go into detail onto it.

ADV MYBURGH SC: Sure.

MR GAMA: So the – the relocation is initiated by Mr Vallihu who was the Chief Executive of Transnet Engineering when he writes to Mr Molefe requesting to relocate the assemble line for Bombardier and China North Rail. Because at the

close of the locomotive tender it had been assumed that everybody was going to manufacture in Pretoria – Kuduspoort. However CSR and TE already had assemble lines in Pretoria and they only needed to be rigid just a little bit and then they were able to continue with their manufacturing. With the other two CNR and BT they did not have any assembly facilities so they had to move to Durban. So – but he puts all of that in his memo to say there are competitions concerns. You do not want one diesel
 10 manufacturer looking over the shoulder of another it is better to relocate to this other places. So that is how it starts.

The – it ends up with the – the letters that you showed me where after the 23rd of July then wrote back to BR and CNR indicating to them that these are the maximum amounts that were approved for them and that they would be paid periodically.

The – so the rationale of all of that I think was well documented and well-motivated by Mr Vallihu in this – in his letters that when they asked for the – for the relocation.

20 So at a time then enter Mr Goncalves where he came through with one or two of his other partner and then he informed us that there had been this involvement of BEX – B-E-X or BEX Business Expansion Structure something. And then at that time that is when I then asked that Werksmans investigate I have attached SSG9 the – a letter – a first

report from Werksmans where they said that they have commenced with the investigation and that they were going to engage with Mr Goncalves so that they can get more information and start with that process.

And at some point in the commission you were also informed Chair that there was no relocation. But I think we can agree that there was a relocation to Wentworth and that is where these two entities were in terms of the relocation program.

10 The obligations for payments where they fell within the divisions to then say as and when certain things happened and they should be paid. But at some point I then decided that since we are doing this investigation and there were these allegations that came about as a result of BEX I then asked the CE of TFR Mr Ravi Nair to stop all payments to these two entities both BT and CNR so that we can have some kind of understanding of what the relocating program amounts were and whether or not we had – they had not been inflated to us.

20 So that was done and they stopped those payments and they wrote to – they suspended those payments and they only – they said to them we would only pay you just for the delivery of locomotives and none of the relocation until a time when we are clearer.

As I have said to you Chair I am unable to give you a

full report because I never saw the – the full report from – what is his name – Werksmans in terms of the finalisation.

And also in the – I have also indicated that it has subsequently emerged following the submission of a detailed motivation that during the – and during the commission's hearings that Yusuf Laher one of the financial executives had raised certain objections and highlighted certain issues of concern which were brought to the attention of the team that was working on the recommendation and does not
10 appear to me that his concerns were ever addressed.

But at that time of signing I had no knowledge of his concerns and I had no reason to doubt the bona fide's of the high level team that was involved in the negotiation of the relocation costs and I had no cause to be concerned at that time up until the time that Mr Goncalves visited me and then that is when I learnt that there was a commission agent that was used. And so I had just looked at the two amounts that they were almost similar to one another. But it seems now from what transpired that we probably could have paid less
20 for the – for the CNR portion at least.

But each one of them and I have attached for the commission the actual proposal for BT and CNR they are all – they are marked and they are in this particular – I do not know – I do not wish for us to go through them but you will see that they are almost very similar and they are almost on

par with each other.

ADV MYBURGH SC: And Mr Gama you also deal with this further at page 165 in dealing directly with Mr Goncalves' statement. Perhaps if you want to – if there is anything you want to deal with at paragraphs 47 and 48 it seems that these are things you have –

MR GAMA: Yes.

ADV MYBURGH SC: We have already traversed by and large.

10 **MR GAMA:** Yes I already traversed them and you did indicate that amongst them there were two issues really there.

The first issue was that there had not been any consensus between CNR and its partners – the local partners Goncalves included about the appointment of this BEX.

And then the main thing that was significant to me and to Transnet was that in this 2015 proposal I think I was now talking to him in 2017 and he was then saying that look
20 that variation agreement there was the presence of BEX who end the commission and therefore maybe if they had not been there the costs would have been lower.

If you go my paragraph 48.2 then they say they requested the Chief of Legal at Transnet be fully briefed to ensure that investigation is carried out into CNR and BEX

involvement in the CNR consortium.

As I have indicated I however never received a preliminary nor final report from Werksmans who had been instructed in this regards. Werksmans had advised at the time that there was a delay due to waiting for information from the high value tender teams. But by then we had also taken the decision to stop any further payments to both CNR as well as BT that related to the relocation process pending the outcome of the Werksmans Report.

10 I think that is a fair summary.

ADV MYBURGH SC: Alright. Can I just before I conclude on this can I ask I have seen reference and some documents to the effect that in addition to concluding these LSA's with the OEM's you also concluded maintenance contracts, is that right?

MR GAMA: Yes with OEM's yes.

ADV MYBURGH SC: So those were separate contracts?

MR GAMA: Ja those – those are for after sales service they kick in two or three years after the locomotives have started
20 working because they relate to the maintenance.

ADV MYBURGH SC: What I must just mention to you if you want to comment you can is that money flows evidence shows that Mr Essa also concluded BDSA's in relation to the maintenance contract.

MR GAMA: BD

ADV MYBURGH SC: Business Development Services Agreements.

MR GAMA: Okay.

ADV MYBURGH SC: In other words these...

MR GAMA: Okay as it is commission agreements.

ADV MYBURGH SC: These commission kickback agreements ja.

MR GAMA: No I am not – I was not aware of that either.

ADV MYBURGH SC: So you were talking about the 67 or so
10 million that BEX was paid and you said well perhaps it could
have been lower if it had not been for that. I just want to –
to put this to you. Money flows intends to lead evidence
which will demonstrate that the total – the grand total of all
kickbacks paid to the Gupta enterprise relating to the 95
locomotives, the 100 locomotives, the 359 and 232
locomotives that being part of the 1064, the attendant
maintenance contract that you have spoken about and the
CNR relocation costs that we have spoken about the grand
total is just short of R3.5 billion.

20 **MR GAMA:** Eish.

ADV MYBURGH SC: I mean that must come as a real shock.

MR GAMA: Ja. So these – these money flows are monies
that have flown to these different letter box companies that
you are talking about.

ADV MYBURGH SC: Yes.

MR GAMA: Ja. It is shocking.

ADV MYBURGH SC: I want now to turn to the issue of T-Systems. T-Systems is dealt with as you know by Ms Macedo. Can I ask you please to turn up file BB – sorry Exhibit BB11. Ja. So could I ask you to go to page 1. Now Mr Gama I am going to try and paraphrase the evidence of Ms Macedo I mean a lot of this is not in dispute and there is a lot of common ground between two of you.

Perhaps you could go to page 5 and you will see that
10 she says that Transnet issued and approved a RFP with the provision of IP Data Services to Transnet in November 2015. I just ask you to confirm that we know that the entity that held the contract before them was T-Systems. They had had a five year contract which had been extended I think by two years would you confirm that?

MR GAMA: Yes.

ADV MYBURGH SC: And she says at 13 a tender related to the outsourcing of Data Services for the whole of Transnet.

If you go to page 6 paragraph 14.1 the estimated cost
20 of this tender was 1.85 billion over five years. She goes on to explain at paragraph 16 that there were seven bidders including T-Systems and Gajema.

MR GAMA: Yes.

ADV MYBURGH SC: She then goes on to explain that two bidders were shortlisted. That being T-Systems and

Ubunthu. And over the page – page 8 Ubunthu withdrew and was then replaced by the third highest ranking bidder Gajema.

MR GAMA: Yes.

ADV MYBURGH SC: So now it was Gajema and T-Systems.

MR GAMA: Correct.

ADV MYBURGH SC: She says at paragraph 20 that on the 22nd of September 2016 she was presented with a complete file of the evaluation process by Mr Thomas requesting my
10 signature on the recommendation to award the tender to T-Systems. You confirm that.

MR GAMA: Yes.

ADV MYBURGH SC: Then she says at page 9 at the top that this recommendation was not in line with the evaluation outcome of the process and she explains at paragraph 22.1 that Gajema provided the lowest price bid in the 00:29:17 stage scoring a final score of 99%. T-Systems scored a final score of 85.07%. You see that.

MR GAMA: Yes.

20 **ADV MYBURGH SC:** She then says at paragraph 25 on page 10 just below the quoted part she has explained that she had her misgivings but she says I then appended my signature to the recommendation letter this is in respect of T-Systems but made the following comments at the bottom of the letter. Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: She says at 26 that:

“The discomfort I had about the fact that I signed the recommendations to T-Systems even though I had made my point clear, led me to writing a detailed response to each and every risk raised, explaining why the risks highlighted were not risks in my view...”

Do you see that?

10 **MR GAMA:** Yes.

ADV MYBURGH SC: Then at paragraph 28, at page 11, she says that roundabout this time, she held a meeting with you at the Tintswalo Hotel in Waterfall Estate. She says:

“During this meeting, Mr Gama tested a few things with me, like, the dangerous of procurement, my level of conviction, given my view about the risks, and where the tender process was.

20 I gave him my assurance based on the Transnet procurement processes followed, the relevance of some of the risks raised, the decision to award the tender Gijima was the right way...”

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Then she says at paragraph 30:

“The next time I interacted with this process during or about late December 2016 was in Mr Gama’s office where he called both the GC-SEO, Mr Thomas and me to the office.

Mr Gama recommended that in my capacity as the GCIO and the business owner of the tender, I should be allowed to go and test the identified risks with Gijima...”

10

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: And then at 31 she says that:

“On the 23rd of January, GC-SEO called a meeting with Gijima in Transnet Engineering offices and they worked through the risks that had been identified in relation to Gijima...”

And then at 32 she says:

“At this point, Gijima was excused and a formal resolution was then taken at the end of the meeting by the Transnet Team that all risks had been mitigated and that the tender can be awarded to Gijima...”

20

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: She says at 33:

“On or around February 2017, just before the sitting of the Group Leadership Team, there were two separate memoranda drawn up with different recommendations for Mr Gama’s signature.

The one recommendation was from Mr Peter into whom the procurement function reported and the other memorandum from me.

10 The one memorandum addressed to Mr Gama from Peter, Thomas and myself recommended that the tender be awarded to T-Systems...”

And then she says in the next sub-paragraph:

“The other memorandum that I prepared recommended that the tender be awarded to Gijima...”

MR GAMA: H’m.

ADV MYBURGH SC: Sub-three. I suppose quite smartly. You, according to her, made an emphatic point that you
20 wanted to sign only one memorandum to the ADC and not two memoranda. Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: And then at 34:

“Mr Peter and I finally signed dated 8 February 2017, recommending that the

tender be awarded to Gijima...”

Then over the page under the heading, Decision by the ADC to award the tender to the second placed bidder. That is T-Systems. She says that:

“On 13 February 2017, the tender was presented to the ADC.

I attended this meeting with ADC members...”

And she sets out the persons that were present at that meeting, and we see that at 35.1, Mr Stanley Shane
10 by that time, if I understand correctly, he was the Chairperson of the BADC. Is that correct?

MR GAMA: That is correct.

ADV MYBURGH SC: You were present at this meeting?

MR GAMA: Yes.

ADV MYBURGH SC: And then at 35.4, Mr Zanoool(?)
Nugby(?). Was he a member, a Transnet Board member and a member also of the BADC?

MR GAMA: Yes.

ADV MYBURGH SC: Right. She then says at paragraph
20 38 over the page:

“The tender was discussed in detail during this meeting.

Both Mr Thomas and I were granted the opportunity to make verbal submissions to the ABDC(sic) and to answer questions...:

She says that:

“During this meeting, Mr Gama sent me a message or Whatsapp to tell me to “stop fighting because it was clear what the board wanted”...”

She says she only saw this afterwards. At 39:

“The transcript of the recording is attached.

Despite my earnest attempts to convey to the ABC that due processes was followed and that the risks identified after the evaluation process had been addressed and that the tender should be awarded to Gijima as the winner.

The ABC decided otherwise.

A copy of the ABC recommendation to the board is dated and attached, et cetera...”

She says at 40:

“When the ABC recommended to the board to grant final award to T-Systems, although I attended, I able(?) to say because it was now the ADC recommending to the board and not management.

I have since noted that the ADC’s recommendation to the board was signed by Mr Gama and Mr Peter, both of whom were

Executive Board members...”

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: And then she says at paragraph 44:

“Objections by Gijima and unsuccessful negotiations with T-Systems:

I was not personally involved in the subsequent events described below.

10 I was, however, made aware of the events by Mr Selinga of Transnet Legal and Mr Gama, who were the recipients of updates in respect thereof...”

She mentions Gijima’s objection to not being awarded the tender. The matter was escalated to the Transnet Ombudsman and to National Treasury. Over the page:

20 “National Treasury informed Transnet it will not be allowed to extend the agreement with T-Systems further than May 2018 and National Treasury informed the Transnet Board of Directors that its decision to award the tender to T-Systems was wrong and directed to Transnet to rescind the decision and award the tender to Gijima...”

She says at 45:

“The board then took a decision on 27 September 2017 to rescind the award to T-Systems and award the tender to Gijima...”

Then she talks about settlement negotiations that were unsuccessful and then if you go to page 19 she talks about the fact that a new board was appointed in 2018 and then it would appear that a decision was taken to seek to review and set aside the award to T-Systems and instead to appoint Gijima and she mentions at paragraph
10 60, and I will come to the judgment in a moment:

“I have since learnt about the high court judgment delivered on 12 December which reviewed and set aside the decision to award the tender to T-Systems...”

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: Now you have provided a response to this in two places. Could I ask you to turn to Exhibit 28?

20 **MR GAMA:** [No audible reply]

ADV MYBURGH SC: And you deal with the issue first at page 154 and this is in response to Mr Molefe. It is quite a crisp response. You say at 34.1:

“As management, we submitted a proposal to the Board Acquisitions and Disposal

Committee indicating that the adjudication process had submitted Gijima as entity to appointment as the preferred bidder for the Data Services Tender...”

You say:

“It is up to Mr Stanley Shane, the Chairperson of the Board Acquisitions and Disposal Committee.

10 A private meeting between myself and Linda Mbasa, the Chairperson of the board, advised that the Non-Executive Members of the board would not follow management’s recommendation for the appointment of Gijima and would rather appoint T-Systems...”

Is that correct?

MR GAMA: That is correct.

ADV MYBURGH SC: You say at 34.3:

20 “The reasoning of the board’s decision not to implement management’s recommendation was varied and is dealt with more fully herein below in regard to Mosidi’s testimony...”

And then you say that:

“Management addressed a letter to National Treasury, the latter having agreed with the recommendation that Gijima be appointed...”

And you go onto say:

“In fact, litigation was subsequently pursued in the South Gauteng High Court which ultimately resulted in a declaration(?) order appointing Gijima on the basis of management’s initial recommendation...”

MR GAMA: That is correct.

ADV MYBURGH SC: You confirm that?

MR GAMA: Yes, I confirm that.

10 **ADV MYBURGH SC:** And then the other place that you deal with this, is when you respond to Ms Mosidi. Could I ask you please to turn to page 159?

MR GAMA: [No audible reply]

ADV MYBURGH SC: And you deal with this from 159 through to 156. Perhaps I could invite you ...[intervenes]

CHAIRPERSON: I am sorry. Did you say from ...[intervenes]

ADV MYBURGH SC: One, five – page 159. I beg your pardon.

20 **CHAIRPERSON:** Yes.

ADV MYBURGH SC: To page 165.

CHAIRPERSON: Okay.

ADV MYBURGH SC: Paragraphs 38, Chairperson, to 46.

CHAIRPERSON: [No audible reply]

ADV MYBURGH SC: Now perhaps I could ask you to go

through this. It seems that the first paragraph 38 is very much background that we might already have traversed. If suitable to you, could you start by taking us through from paragraph 39 at page 160, where you deal with the meeting that you had at the Tintswalo Hotel?

MR GAMA: No, thank you. When I wrote this affidavit, I had not been provided with the *viva voce* testimony of Mosidi but I have, subsequent to that, I think in the past two days or so, have been provided with aspects of it as it
10 relates to that aspect about the Tintswalo Hotel meeting. I think we should call it that.

The context of that meeting, simply Chair, is that Ms Mosidi was new at Transnet and she had signed a document that she did not believe in but had nevertheless signed it and it was in front of me and that, one, that why she had signed a document that she did not believe in because she signed it and then wrote other things next to it. So...

And I have gone through the document but I
20 myself was going through the document and had many questions around it. And I think that is the document she refers to as a document of September or August 2016.

I got a sense that she may have been intimidated to sign the document. [laughs] *Or was not* too sure but because she was new and so I got the sense that

maybe I needed to engage with her and perhaps I could learn(?) from her what the issues were. I did not want to influence her in any way in terms of whatever decision that she needed to take and I think that she has said to you, Chair, this Commission that she believed so as well.

So she had signed this document despite her discomfort. So I thought that maybe she had been intimidated one way or the other but also I wanted her to have comfort that she can disagree with things and I
 10 needed to get a sense of whether she had that courage to be able to disagree with things and to put facts on her own in order for her to be able to make those decisions.

Now I have seen Chair, you have made her, especially when she spoke to you, she changed her statements many times. [laughs] Whenever you would ask her questions then she would go with what you thought ...[intervenes]

CHAIRPERSON: H'm.

MR GAMA: ...was correct but I think in terms of what you
 20 may have wanted but at the end, I think she looked like she was prone to some of your influence, Chair. [laughs]

CHAIRPERSON: Well ...[intervenes]

MR GAMA: In terms of some of the *viva voce* ...[intervenes]

CHAIRPERSON: ...there are many witnesses who have

appeared before me.

MR GAMA: Ja.

CHAIRPERSON: I have no recollection of what you are talking about ...[intervenes]

MR GAMA: I know.

CHAIRPERSON: ...personally(?) ...[intervenes]

MR GAMA: Ja.

CHAIRPERSON: I ask witnesses questions and ...[intervenes]

10 **MR GAMA:** Yes.

CHAIRPERSON: ...they may or may not think what is behind the questions.

MR GAMA: Ja.

CHAIRPERSON: H'm. But obviously, there is no desire to make them change what they intend to say, if it is the truth.

MR GAMA: Ja.

CHAIRPERSON: H'm.

MR GAMA: So. But in any event, I think, as I say, she did change her statements many times. But the key thing,
20 because I saw there is something – there is a reference which is not in the affidavit of hers but there is a reference in the *viva voce* to a five million or something about danger and all of that and I do not know what she herself probably thought but at best, I may have said to her: Do you know that people – when you are adjudicating a big tender like

this, people are not scared to spend five million just to survey – put surveillance on you? [laughs] At best.

But she – there were issues about dangers and all of that but I think they are neither here nor there. My intention was to assure her that she needed to – and I think that is also the sense that she got, finally, when she wrapped up her testimony and with you here.

So I walked away from that Tintswalo meeting, thinking that she would have that courage, at least, to
 10 interrogate the procurement processes and to make sure that she does not compromise any governance and that was my sense, if we deal with that aspect. If we then move to the next aspect of ...[intervenes]

ADV MYBURGH SC: [Speaker's microphone not switched on – unclear]

MR GAMA: Ja.

ADV MYBURGH SC: Well, perhaps we should just perhaps deal with the *viva voce* evidence and you can then comment on it. I mean, I think you have dealt with it
 20 broadly.

MR GAMA: Ja, I have dealt with it broadly because I do not know how much time you have.

ADV MYBURGH SC: Well, let us go to page 250.428. It is almost right at the end of your bundle. That is a transcript of her evidence.

MR GAMA: 250 point...?

ADV MYBURGH SC: 428.

MR GAMA: [No audible reply]

ADV MYBURGH SC: So at line 20 at page 428, she is now ...[intervenes]

MR GAMA: I am not there yet, sorry.

ADV MYBURGH SC: You are not...

MR GAMA: Okay, ja.

ADV MYBURGH SC: So at about line 20 and for the sake
10 of trying to save some time, we get to the key passage.
She talks – now she has gone to the hotel and she is
looking for you, she finds you and she says at line 20:

“Good evening, sir.

And you then said:

“Look, Makano. I just want to understand that,
one, you are convinced that your decision
about T-Systems is the right one?

Two, remember procurement is dangerous. It
is a very dangerous process.

20 If, for example, you scuttle a party, which by
now people would have shared maybe five
million, five million, five million and you come
and you scuttle that party, you would have
endangered your life.

So are you sure?

Are you certain that you have done your due diligence in terms of interrogating this process?

Are you comfortable in terms of where you are going to land?

Because I would like to make you sensitive as a new person to the dangers of procurement as well, et cetera...”

You want to comment on that?

10 **MR GAMA**: Ja, I think – I mean, straight up, as I indicated to you, there was not any discussion about decisions relating to the entities, as she will prove herself in the same *viva voce* testimony. If you – so I deny any discussions. In fact, as I say to you, there is nothing about sharing of money. At best, I think, what I could have said is. People are willing to pay lots of money to do surveillance on people who are making decisions about procurement.

But really, the context of this is a simple thing
20 which deals with whether she was intimated because I was very worried that she had found a document that she did not believe in. So if you – for instance, if we just – if we go to page 160.

CHAIRPERSON: Is that 250.160?

MR GAMA: 250.430.

CHAIRPERSON: 250... H'm?

ADV MYBURGH SC: Oh, I am with you. So you are talking about the transcript number?

MR GAMA: Yes. Sorry, I used the transcript.

ADV MYBURGH SC: Ja.

CHAIRPERSON: Oh, okay. The number at the bottom. Okay.

MR GAMA: Chairperson, I was in – at the bottom there where you had to by references to procurement is
10 dangerous and if you scuttle, that term, that certain people may have already divided the proceeds. I deny that there was such a discussion. Then she says no the whole discussion rattled her. But if you then move further to page – to the next page. The Chairperson says in the middle:

“Oh, earlier on, you said by the whole talk?
You say you were rattled by the whole talk?
And I was wondering if you mean the whole
discussion but you mean this particular
20 statement, that is what rattled you?...”

And she says:

“No, those particular statements, Chair...”
If you then go further down, the Chair says:
“That evening, did you go into the particular
detail of the risks?”

And then she says:

“We did not even go into some.

He was just saying: Are you sure?

Can I look you in the eye?

Are you certain that you are right?

That is what I think you are saying.

Are you aware of the danger of going against
the tide?...”

So for me, Chair, it is actually the other way
10 around. As I have said to you, she had signed the
document but she did not agree with and that is what had
worried me and I had wanted to talk to her to say: Look,
you do not need to find things that you do not agree with.
It is better not to sign them. But she was new and I
wanted to engage with her and give her some comfort in
terms of the – but if you go further, she asks – you ask her,
Chair:

“Did you ultimately sign the document?”

She says:

20 “No.”

That is at the bottom of the next page at 432.
So it is very clear that at the end she understood that our
discussions were really just around her and the kind of
assurance that I required in order for her to do her work
properly. So the other issue is about startling and people

sharing. I really do not know where she got that from. I deny that but I think, as I say, when I look at 166 Chair, which is at page 436. She eventually says – you ask her:

“On your analyses, what was the purpose of that meeting?”

And then she says:

“I would give you two views.

One, either that he was actually testing as a new Executive to Transnet whether I would do due process and whether I can stand even when it is difficult to and stand up to any questioning or interrogation...”

She nailed it there that that is what it was all about. And I think we need to go no further than that.

ADV MYBURGH SC: Alright. Well, then let us get to the part of your affidavit where you deal with Mr Shane. If you can go, please, to page 161, paragraph 42?

CHAIRPERSON: Is that... The one with ...[intervenes]

MR GAMA: ...we are going back to the same bundle.

20 **ADV MYBURGH SC:** Yes, 161. It is right in the front, Chairperson.

CHAIRPERSON: Ja.

ADV MYBURGH SC: Just before you – and I am going to come back to this but have you come to learn that Mr Shane is actually a well-known Gupta associate? Have

you come to learn that?

MR GAMA: No, I have not come to learn that. [laughs]

ADV MYBURGH SC: But you have heard ...[intervenes]

MR GAMA: I have read things that are suspected, ja.

ADV MYBURGH SC: So just so that we understand this.

Did Mr Shane, did he replace – who did he replace as the Chairperson of the BADC?

MR GAMA: No, he did not replace anyone. There was a new board. I think there has been this tendency where
10 there is a new board and you get completely new people. But the one that – in the board previously, that is the same role that Mr Sharma had played.

ADV MYBURGH SC: Ja.

MR GAMA: H'm.

ADV MYBURGH SC: Okay so when I talk about replacement, I do not mean it literally. So we know he succeeded ...[intervenes]

MR GAMA: Yes, that is ...[intervenes]

ADV MYBURGH SC: ...Mr Sharma?

20 **MR GAMA**: Yes.

ADV MYBURGH SC: Alright. So can we deal with paragraph 42, please?

MR GAMA: So at paragraph 42, I just indicate that before the commencement of the – of that ADC meeting, which was on the 13th of February, I was requested by Mr Shane

when I arrived that the meeting be adjourned so that he would have a brief session with me. So I had a discussion with Shane in the presence of the board's Chairperson, Mabaso. Mr Shane indicated that the non-executive directors would vote to overturn the decision and recommendation that had been made by management to award the contract to the FirstRand bidder which was Gijima, this was now after the December discussion that we had had with Mosidi and after she had determined that
10 the risks were actually manageable.

Mr Shane indicated that as non-executives they had a right to overturn the recommendations of the management and so to overrule, the two of us, who were the two executives that were members of the board and that the majority of the non-executives could be overruled by them in circumstances where they, as non-execs, believed that management had not properly assessed the risks.

And then he then indicated at the board meeting he
20 would also recommend that the decision that had been made by management also be overturned because as non-execs they had the right to do that, so that was the whole gist of it because he believed that we did not assess the risk properly.

So during that meeting I then outlined to Mr Shane

all of the processes that had taken leading to the decision to award the IT data services tender to Gijima and I indicated that there was adjudication, there was a lot of discussions that took place amongst the people and that the decision had not been taken lightly, we had taken it after following proper and due processes.

He indicated that no, look, his reading of that whole process was that T-Systems would have won this tender had it not been for the fact that Ubuntu Technologies had
10 withdrawn at some point.

And then he then had certain concerns about Gijima that he came up with and in particular he said look, you could wake up tomorrow morning and Transnet cannot even send an email because you have got a new contractor. That would be a disaster to the reputation of Transnet just as an example.

The meeting became and tense and he said to us – to me, look, it does not really matter what we as management thought about Gijima and that he thinks that
20 T-Systems should continue with this because in any event the ultimate decision lay with the board and not with us and he did not want to expose Transnet to any form of risk.

So I indicated to him that look, it would be difficult to change that decision and there would be consequences because that decision conflicted with the outcome of a due

process.

So we then resumed with the meeting at the ADC and then Mosidi and Thomas then came in. We granted them the opportunity to make their verbal submissions. I did not tell them that I had had this meeting which wanted to overturn the decision. So they came in in support of a decision to award to Gijima and they continued to support that recommendation because that was the outcome and I was hoping that maybe Shane would have considered or
 10 reconsidered his stance in terms of overturning that particular decision.

It was a long drawn out meeting, there was a lot of talk and discussions. At the end when Mosidi was persisting, you know, a lot with the argument, I then sent to her that SMS to say look, we may have to look at other ways to deal with this, it is not going to help if you continue to argue in this case because it was clear to me that there was not anything that was going to change the Chairperson's mind around this particular thing, he was
 20 convinced that it needed to change.

CHAIRPERSON: Was it more the Chairperson who was having this maybe heated debate with them or the whole committee?

MR GAMA: It was more led by Mr Shane as the Chairperson of the committee. Ja.

CHAIRPERSON: Okay, continue?

MR GAMA: So I then say at paragraph 43 that:

“The protestations that Mosidi had at the ADC meeting were no different to what I had raised in my private meeting with Shane.”

So we agree with that, said that no contestation.

Then we then submitted a new memo to the board which was submitted by myself and Peter and we indicated in that submission, if you go to page 164, Chair, at the top
10 at 44.2 and 44.3. We indicated in that memo – and that is captured at paragraph 38 and 39 of the memo that:

“Management had recommended that Gijima be awarded the contract as they were the preferred bidder and which was in line with the procurement procedures manual. We then also informed the board that the ADC did not support management’s recommendation for the award of the contract to the FirstRand bidder and we advised them on the basis upon which the ADC did not agree. At the end the
20 board carried the recommendation of the ADC and they appointed T-Systems instead of Gijima. Less than 10 days after that Gijima protested, they wrote to the Transnet ombudsman.”

I advised them that since this decision had been made by the board, which is the accounting authority, that they

needed to refer that matter to the National Treasury because we could not make any decision that was counter to a decision that the board had already made.

“And ultimately and after numerous discussions the board agreed that management had been correct in recommending the award to Gijima and after the National Treasury had intervened. And then at time T-Systems communicated its view that they would challenge the overturning of their appointment by the board because they believed that they had won this thing on merit.

Ultimately at the end of it all I applied to the South Gauteng Court for a declaratory order to set aside the decision of the board to award the contract to T-Systems and I think the board concurred with that because there were certain issues that they could not – they were scared that they would be sued by T-Systems because there was now a change in the award. I then learnt that at some point I think in 2018 or the beginning of 2019 the declaratory order was actually issued as per the prayers that were made to the court.

So I think that is an overview of that matter, Chair.

ADV MYBURGH SC: Could I ask you – let us go to the judgment, that you find at page 214 of EXHIBIT BB11, annexure to Ms Mosidi’s affidavit.

MR GAMA: Ja, I have got it.

ADV MYBURGH SC: So if you turn forward in this judgment to page 225 you will see at paragraph 29, 225, that Transnet submits that it acted unlawfully in deciding to award the tender to T-Systems which was not the highest scoring bidder. Now that was the contention. And then over the page at paragraph 30, the court found that:

10 “The crux of the review is that T-Systems was not the highest scoring bidder, Transnet acted on its own understanding of its authority...”

Etcetera and then the court quotes a section, which permits a deviation from the basic principle that the award must be made to the highest scoring bidder, that section provides that once the bids had been scored at the award stage of the process the contract:

 “Must be awarded to the bidder who scored the highest points unless objective criteria in addition to those contemplated in paragraphs (d) and (d) justify the award to another bidder.”

20 And ultimately what the court concluded is that there was no such justification, is that correct?

MR GAMA: Yes, I think the issue of the risks that had been identified, the court would have felt and we agreed with it that the risks did not amount to objective criteria.

ADV MYBURGH SC: Now I want to take you to something

different and that is at page 229. At paragraph 38:

“One is left wondering...”

Said the court.

“...whether the ADC was not being driven by extraneous considerations in this instance despite management’s satisfaction with Gijima’s response that the tender should be awarded to the lower scoring bidder. This is not merely fleeting fancy, Transnet annexed to its papers a transcript of the
10 meeting of the ADC held in February 2017 shortly before the decision to recommend the award of tender to T-Systems. The transcript reflects the Chair of the committee, Mr Shane, making the following comments, amongst others.”

I am just going to then read the underlined portions of the quote:

“I will say that again slowly. They are not alien to suing their customers, okay? I am happier with the risk of getting sued by Gijima who did not get the
20 contract than us getting rid of the incumbent we helped to create.”

The next emphasised statement by Mr Shane:

“I will tell you what my understanding at the time of putting this thing out to tender was, that we wanted to keep T-Systems honest, that was the actual

motivation.”

And over the page the court says:

In the light of these remarks, the recommendation by the ADC, which was ultimately adopted by the board and implemented, was not only clearly irrational but also tainted by bias in favour of the incumbent supplier of IT services, T-Systems. To permit such a tainted decision to stand would be inimitable to the constitutional requirement that
 10 tender processes should be fair, equitable, transparent, competitive and cost effective. For this reason too I am satisfied that Transnet acted unlawfully in deciding to award the tender to T-Systems.”

Do you see that?

MR GAMA: Yes.

ADV MYBURGH SC: I want to just then take you to the transcript that the court refers to and that you find at page 137.

20 **MR GAMA:** Of the Mosidi file?

ADV MYBURGH SC: Yes.

CHAIRPERSON: And what is the page number?

ADV MYBURGH SC: 137 the transcript starts and Mr Shane speaks a lot in this transcript and says a number of things but I just want to point out to you at page 145, Mr

Nugdi(?) also addresses the committee, you see at page 145 from line 12, the whole of 146, 147. At 147 at the top he says:

“The most important thing to me, the most important challenge that I have, the most important issue I have is around the risk of changing from one supplier to another and I am not for one moment suggesting that the incumbent automatically went – there should be an element of process which I agree with a hundred percent and the process was followed but I do not see apples being compared here and to me the risk is very bad here.”

This similar sentiment expressed by Mr Shane, is that correct?

MR GAMA: Yes.

ADV MYBURGH SC: So I now want to just mention to you what the money flows investigation has revealed and some evidence has been led in this stream about this. So what the investigation reveals, Mr Gama, is that from mid-2012 to mid-2015 T-Systems made regular monthly payments of more than R80 000 to Zestilor. Zestilor is company that was owned by Salim Essa’s wife. So more than R3 million was paid over that period. Those monthly deposits were used to, amongst other things, fund payments to Mr Essa over that three year period. He received payments of more

than half a million rand.

The evidence, Mr Chair, you will remember that has been led in this stream is there was then a time when T-Systems ceded to Zestilor the equipment sale and rental elements of the MSA that it had with Transnet.

The money flows team have also investigated this particular transaction and they have come to conclusion analysing the Transnet, as the court did, that Mr Shane motivated strongly in favour of keeping the contract with T-
10 Systems. Their investigation has revealed that Mr Shane is a Gupta associate. What the investigation has also shown is that there is strong evidence suggesting that Mr Nugdi had by February 2017 been operating as a money launderer for the Gupta enterprise and had used his company, Leboshile(?) Technologies to expatriate more than R5 million in proceeds of kickbacks paid to the Gupta enterprise in respect of corruptly procured public sector contract. Do you have any comment on that, Mr Gama?

MR GAMA: No, I am not aware of it. As you say this is
20 what has been established but I think it is quite shocking if it is true that there were these types of things that were happening.

Chair, I think one of the things that we had started to do at Transnet before I left were to look at a list of some of these vendors and – because there were lots of

allegations in terms of different entities and I opened at the Hillbrow police station on the 21 November 2017 to look at all of the allegations that had levelled especially against entities that were doing business with Transnet.

But I think what one had found was that Transnet itself did not appear to have been paying Commissions to anybody but that it was entities that were contracted to Transnet that were paying outside people and it seemed that there was a *modus operandi* that seemed to indicate
10 that perhaps there were internal people, I do not know who, who provided information to these entities in terms of saying maybe you are going to be awarded this tender.

In order for you to be awarded this tender, you know, we think have influence and then these people maybe were gullible. It would just seem that there was some kind of information that would leak to third parties because all of these entities, most of them that were being paid, that were recorded as being paid, they did not do any business with Transnet.

20 So our people had made those preliminary investigations that – I mean, those preliminary findings, our auditors, internally, that there was such a thing but we could not pin down in terms of who and how and where some of this seemed to be happening because we could also not find that in terms of the procurement processes

themselves that there was something amiss in terms of maybe inflation of prices.

The process seemed to go well inside the tender process but there still emerged all of these entities that seemed to have been paid by contractors of Transnet. The contractors were paid to third parties. Obviously at Transnet we could not police that because we did not know but those were some of the preliminary things that we found.

10 **ADV MYBURGH SC:** Alright.

MR GAMA: But I do not know that actual people or the individuals that would have been involved.

ADV MYBURGH SC: I want to then turn to my last main topic and then there are just a few things that I need to sweep up after that, concluding questions that I want to ask you. The last main topic I want to deal with is Nkonki. Could I ask you please ...[intervenes]

CHAIRPERSON: Maybe this would be a convenient time to take another ten minutes adjournment?

20 **ADV MYBURGH SC:** Certainly, Chairperson.

CHAIRPERSON: Let us take a ten minutes adjournment and then we will resume. We adjourn.

INQUIRY ADJOURNS

INQUIRY RESUMES

CHAIRPERSON: Okay let's continue.

ADV MYBURGH SC: Thank you Chairperson. Alright, Mr Gama please could you go, I think you have been provided with Exhibit BB3a – so affidavit of Mr Mohamed Mohamedi. Could I ask you to turn to page 29 please. Mr Mohamedi says at paragraph 5.11 under the heading Nkonki:

“In March of 2018 the Auditor General of South Africa announced the termination of contracts with Nkonki as a result of the negative publicity and the association with the Guptas. Transnet followed suit
10 and terminated the internal Audit contracts with Nkonki as well.”

The next sub-paragraph he says:

“I have reviewed some of the contracts that Nkonki had with Transnet and noted the following:

Next sub-paragraph:

“In January 2017 Transnet received unsolicited bids from Nkonki and Oliver Wyman for a variety of proposed services including supply chain efficiencies, coal and iron, ore, lime volume and
20 tariff optimisation.”

Next sub-paragraph:

“At that time Nkonki had an existing contract to provide Transnet internal audit function. In a memorandum dated February 2017 addressed to the ADC Transnet Executives proposed that Transnet

utilise the existing internal audit contract with these unsolicited proposals. It was argued that the existing contract allowed for non-audit ancillary services. In February 2017 the ADC approved the use of Nkonki as consultants and delegated the GC and Mr Gama at the time to sign a letter of intent for an amount not exceeding ZAR500million. Extract of the ADC minutes is attached.”

Next sub-paragraph:

10 “The initial contract amends 1 August 2013 for a period of five years, total value of 500million, the suggested extensions meant an increase in value of 100% and a further 20 month extension to 2 March 2020.”

And the last sub-paragraph:

20 “Today Transnet has remitted R26.1million for these related services with a further R60million outstanding as Transnet has disputed this amount. Mr Mohamedi then opines that firstly Transnet’s acceptance of Nkonki’s unsolicited bid did not comply with the National Treasury Practice Note as the unsolicited proposal did not *inter alia* contain any innovative solution and secondly the 100% increase in the value of Nkonki’s contract is a contravention of Treasury Practice Note 3 that limits

the variation of contracts to a maximum of 15% or 15million.”

Now I would just like to take you then to the practice note and treasury instruction, and could I ask you about your bundle, Exhibit 28 and ask you to go to page 250.82.

CHAIRPERSON: Page?

ADV MYBURGH SC: 250, just hang on Chairperson. Yes, 250.82. Are you there Mr Gama?

MR GAMA: Yes.

10 **ADV MYBURGH SC:** So this is the Treasury Practice Note 11 of 2008/9, if you go to page 83 it says:

“Institutions are not obliged to consider an unsolicited proposal but may consider such a proposal only if it meets the following requirements; peer business case, innovative design, innovative approach, product or the service presents a new and cost effective method of service delivery.”

And then at page 84 it says at 3.1:

20 “The accounting officer or accounting authority must reject an unsolicited proposal if the proposal relates to known institutional requirements that came within a reasonable and practical limits be acquired by conventional competitive bidding methods. Relates to products or services which are generally available among other issues.”

And then at paragraph 4.2 at page 85 the unsolicited proposal must be considered as appropriate in terms of the following; compliant unsolicited proposal bid, and you will see at the end 4.2.1.1, it says namely the product or service is unique, innovative and provided by a sole provider who may enter into direct negotiations with the proponent outside of a more competitive bidding process.

Can I ask you please to go to Exhibit BB3b, the annexures to Mr Mohamedi's affidavit. I beg your pardon,
 10 in fact it may be [c]. Sorry Chairperson there seems to be a – can you give me, is that [c]? I've got it, sorry. I do apologise. It is Exhibit BB3b, and Chairperson could we turn please to page 571. Now you will see at 571 this is a memorandum to BADEC which Mr Mohamedi spoke about, if we could go to 575 you will see there's a recommendation that is signed by you on the 7th of February 2017 and ultimately that is accepted by BADEC if you go to page 579, you will see it is an excerpt of minutes of the BADEC meeting held on 13 February 2017, records
 20 resolved that the committee approve and appoint Nkonki Incorporated for consultancy services up to a maximum of 500million as follows.

Now ...[intervenes]

MR GAMA: Which page are you at?

ADV MYBURGH SC: 579 after ...[indistinct].

MR GAMA: Okay.

ADV MYBURGH SC: So if you go back to the memorandum at 571 certainly on the face of it, it doesn't appear that this recommending memo deals with the requirements of the National Treasury practice note in relation to unsolicited bids.

MR GAMA: You know Mr Myburgh when Mr Mohamedi came here he was very desperate to ingratiate himself with the Chairman of the Board of Transnet, because he was
10 acting GCE and he wanted to be appointed as the GCE, and he may have in his frustration given you a lot of things that sounds to me like a man who was there but then starts saying no there was this and this, I have investigated this, but never said anything when it was happening, wanting to give you the impression that he was a bystander, an innocent one.

If you go to the Treasury note I don't know this treasury note whether it applies to Transnet, I have never seen it and it says 2008/2009, Transnet is a Schedule 2
20 entity. This applies to Schedule 3A, 4B, 3C and 3D entities in terms of the PFMA, so I don't know whether any of this thing applies to Transnet or not, because what you have put here before me is for Schedule 3 entities.

The second issue that I want to indicate it is quite normal for entities that we do audit work, we also do non-

audit work, provided that the audit committee agrees that they should do, and also it limits the amount of work that they should do, so by the time you see this it might have been presented to the Acquisition Committee, it is at the recommendation of the Audit Committee to say let us use this entity. Nkonki used to be a very good brand, at the beginning of time and I am sure its founders would also agree and the directors and workers who worked there would also agree. But obviously at a point in time we then

10 learnt that it had gone rogue in one way or the other, there were those allegations.

At the time when we learnt that it had gone rogue we terminated the contractual relationship between Transnet, I terminated that contractual relationship between Transnet and Nkonki when we learnt that something could be amiss, because we also needed protect the reputation of Transnet. I don't know whether the Auditor General terminated before us or not but I suspect we terminated even before the Auditor General.

20 And at the time according to Mr Mohamedi an amount of R26million had been spent on the work that had been agreed for them to do. There was quite a stringent manner in which anybody could be paid, I hear there's a lot of discussion about innovation or innovative but as I said Transnet is a Schedule entity in terms of the PFMA, I don't

know if this applies to Transnet, I have never seen it, but because the documents that we sign are also signed by compliance people, and they would have known before it came to me they would have known whether it or not this could be done or not, so I don't know Chair.

CHAIRPERSON: Do you remember whether irrespective of whether this note from – an instruction note from Treasury applies or not, whether Transnet had a policy on how to deal with unsolicited proposals.

10 **MR GAMA:** I think Transnet did have a policy to deal with unsolicited proposals, and I don't know how this proposal actually came about, but there was a policy I couldn't – I wouldn't be able to say to you that this was an unsolicited proposal or not, I wouldn't be able to say to you whether it was not from the people that went to Nkonki to say look since you are inside and you are trying to do certain things maybe you would be better able to do this you know to do this, I don't know the genesis of this particular thing.

CHAIRPERSON: Would you remember what, whether –
20 would you remember any important features of that policy or that is something you cannot remember now?

ADV MYBURGH SC: No I can't remember now but the custodians would have been the procurement sort of thing.

CHAIRPERSON: Okay, Mr Myburgh.

ADV MYBURGH SC: Alright and then let's deal with the

National Treasury instruction. I will have to investigate the points you made about whether the practice note applies to the schedule 2 entity.

MR GAMA: Ja, I think you would have to put one that schedule 2 so that we would know, because we can spend a lot of time discussing something that where Transnet is excluded. Personally I have never seen this but it says 2008/2009 which is 12 years ago.

CHAIRPERSON: H'm, okay.

10 **ADV MYBURGH SC:** Let's turn to the National Treasury instruction that you find at page 250.94. Could I ask you please to go to page 250.97.

CHAIRPERSON: Is that in a different bundle?

ADV MYBURGH SC: It is in Mr Gama's bundle B28, I am sorry DCJ.

CHAIRPERSON: Okay. At 250?

ADV MYBURGH SC: It starts at 250.94, I am going to take Mr Gama if I might to 250.97.

CHAIRPERSON: Okay.

20 **ADV MYBURGH SC:** It says at paragraph 9.1 the accounting officer/accounting authority must ensure that contracts are not varied by more than 20% or 20million, including VAT for construction related goods, works and services and/or services and 15% or 15million including VAT all other goods and services of the original contract

name. Any deviation and excess of the prescribed threshold will only be allowed in exceptional cases, subject to prior written approval from the relevant treasury. Did you have regard to this?

MR GAMA: Again Chair I don't know to whom this was applicable to, but I have a recollection at a point in time where these deviations or variations where some of these notes took place, that there were representations to the National Treasury in terms of saying is it the 20% or is it
10 the 20million or the 15% or the 15million, because for an entity as large as Transnet if it is at 15% it is understandable, it is acceptable, you do get involved with those kinds of things, but in terms of construction related goods Transnet had its own set of rules that had been approved, that were different, so any application to Transnet of this I don't know. I have just forgotten what it was called, something, something E, I can't remember, or construction related, but an amount of 15million or 20million variation for contracts, I mean let's take the IT
20 data term that we have just been talking about. It was about 1.8billion. If you applied 15% of it, it would take you to about 240million, so – but if you then said no it is the 20million or the 20% then you started getting into some difficulties, so some of these things are a bit difficult, and I don't know as we sit here about applicability because as I

am saying the memo's that I am looking at, the compliance people have signed them in, and they always had the duty to then say can this be done or not and we take the cue from them as well that before you do the business transaction the compliance has looked at it, so I don't know Chair in terms of applicability, but I do know that there was a huge protest at some point around the 20% or 20million which one is applicable because if your contracts were R100million or less then it makes sense but for the
 10 big contracts and then a lot of the things the contracts were bigger than that.

CHAIRPERSON: You know normally when you put as S & H and say all amounts you would ...[indistinct] what would follow after that is whichever is the higher or bigger or lesser depending on what you want to say, so I don't know whether they have left that out or whether when you read it you are supposed to – it is implied to sa ...[intervenes]

MR GAMA: The higher or ...

CHAIRPERSON: Whichever is the higher, because maybe
 20 you say whichever is the lower it wouldn't make much sense I am not sure.

ADV MYBURGH SC: I really don't know and as I say Chair hindsight is a perfect science, where somebody says okay let's look at certain things my way hindsight, the most important thing is to be able to deal with the things at the

time when they are being dealt with, and it is important for the compliance people to make sure that they have dealt with it, because we could sit here for a very long time, dealing with something where there's an actual exclusion, I don't know.

CHAIRPERSON: Yes, of course you would appreciate that – or a comment, or the Commission, part of why we have to do that even with hindsight is to establish where things did go wrong, how they went wrong and what it is that could
10 have been done to prevent them from happening and what measures would be put in place to make sure that in the future the same things don't happen, so you have to say okay this is what happened and how did it happen, people were supposed to ensure that it – certain requirements were met, not do their job, and so on, so ja, okay. Mr Myburgh?

ADV MYBURGH SC: Yes thank you Chairperson. Mr Gama if I could ask you to turn to your bundle at page 250.146, that is where you respond to Mr Mohamedi,
20 paragraph 5.11 which I have read the whole thing to you.

MR GAMA: 250 point?

ADV MYBURGH SC: 250.146, and your response spans two pages on. Do you want to deal with that?

CHAIRPERSON: I am sorry his réponse is on what page?

ADV MYBURGH SC: 250.146.

CHAIRPERSON: Okay thank you.

ADV MYBURGH SC: This is your response to paragraph 5.11 of Mr Mohamedi that I read to you.

CHAIRPERSON: H'm.

MR GAMA: This is in relation to Nkonki?

ADV MYBURGH SC: Yes.

MR GAMA: Yes, I indicate that that memo emanated from the GCFO and it was supported by the Chief Legal Counsel of Transnet, and that was the typed signatory to it, and it
10 was submitted to the acquisition and disposals committee, it was a project which was part of the cost savings and efficiency drive for the optimisation of supply chain management within Transnet and we had hoped that we could save up to R5billion per annum.

The proposal had first been taken to the Audit Committee as I have already indicated, to permit Nkonki to perform certain non-audit related services. I have dealt with some of those issues, part of the issues with this renegotiation of the Kumba Iron Ore contract, the Anglo
20 American contract in terms of which this evergreen contract with Kumba they paid market related rates for portions of the iron ore haulage which rates were significantly below the market price that Kumba's competitors such as Assmang were paying for the same service.

We estimated that an additional R1 billion per annum could be paid by Kumba to Transnet and in fact since 2005 per annum those amounts would have been recoverable and Kumba had failed to regularise the – this position ostensibly relying on the contract with Transnet and the termination date saying that they only want to deal with it in 2028 when the existing contract expires.

So this was as a result of that contract which had been entered in a hurry and in haste in 2005 which we
10 believed was exclusionary and anti-competitive to transport iron ore to Saldanha.

And really what Transnet was trying to do at that time was to remove and embed a derivative on the original pricing mechanism which was linked to the US Dollar and therefore certain – it gave rise to certain embedded derivatives.

So the – the funding for this work it was emphasised that once the cost savings had been raised then the people would be paid from there so that they would 00:01:49 and
20 that there would be a formula that would be utilised to pay for it.

So it was a matter that failed to be considered by the two committees of the board. So one being the Audit Committee and the other one being the Acquisitions and Disposal Committee.

And so it remains my understanding Chair that the costs would have been funded from saving and that no payments would have been made if no savings or if there was no revenue enhancement that had been made.

So if they failed to negotiate a higher prices or tariffs in terms of coal and iron ore then they would not be paid.

There was also a regime a very strict regime and formula which had been developed I think one of the fellows
10 Patrick Dada had been asked to work on formula in terms of how we would pay this so that we do not just pay people and let the different leaders in the business were to assess and evaluate the extent of saving generated and the compensation due as a result of this 00:03:07.

So the assertion by Mohamedi that although the 500 million budget but only 26 million was paid to me is without doubt as a result of the stringent measures that were introduced governing such expenditure.

But as I had said to you earlier Chair it later
20 transpired – I do not know whether it was 2017 or early in 2018 that Nkonki's ownership had changed when we had paid that 26 million by that time. And some of those things had not been declared and it had gone rogue and we terminated the relationship between Transnet and Nkonki.

So that is really the effect of it as Mr Myburgh has

requested for me to comment.

ADV MYBURGH SC: Now Mr Gama this – this particular transaction has also been investigated by money flows. Now I wanted just to put to you whether you were aware that in 2016 the year before this Trillian acquired the auditing firm Nkonki. Trillian.

MR GAMA: No.

ADV MYBURGH SC: That as you know Mr Essa through Trillian Holdings was a 60% shareholder in that business.

10 **MR GAMA:** Of Nkonki.

ADV MYBURGH SC: Of Trillian.

MR GAMA: No, no you saying Trillian had acquired

ADV MYBURGH SC: Trillian acquired Nkonki in 2016.

MR GAMA: Yes.

ADV MYBURGH SC: You know that Mr Essa was a shareholder at Trillian.

MR GAMA: Yes no we have dealt with that issue yesterday.

No what I am saying Trillian acquiring Nkonki because remember Nkonki is a firm of accountants and auditors. So
20 for me it would be – it would have been absurd that such a thing had happened but it was widely reported in the newspapers afterwards but I did not know when it happened. But at the time when we terminated those were part of the considerations that enabled us to terminate the relationship.

ADV MYBURGH SC: In your answer to Mr Mohamedi's paragraph 5.11 you do not take issue with his statement that Nkonki bid was unsolicited.

MR GAMA: Sorry.

ADV MYBURGH SC: When you answer paragraph 5.11 of Mr Mohamedi you do not take issue with his statement that Transnet received an unsolicited bid from Nkonki.

MR GAMA: I do not know.

ADV MYBURGH SC: Right.

10 **MR GAMA:** Whether it was unsolicited I have said to you before that it may even have been Transnet's people that thought they were appoint – approaching an accounting firm that could assist them. I did not know anything about the solicitation or otherwise that is why I was not going to comment on something I do not know.

ADV MYBURGH SC: Alright I have got a few things here and there to deal with. Could I ask you again in your bundle to go to page 250.438. We have done some further investigations into this JZ Foundation donation. There you
20 will find an affidavit from Nomvelo Makhunga she was the person who put up a response before

CHAIRPERSON: Just for the transcribers Makhunga will be M-a-k-h-u-n-g-a and Nomvelo N-o-m-v-e-l-o. You know sometimes when you read the transcript you find that you cannot even make head or tail of what they have written

because they did not know the spelling. Ja okay.

ADV MYBURGH SC: Thank you Chair. So what she does in this affidavit is she refers over the page at 439 at paragraph 5 to her response which we went through previously and then at paragraph 6 she says that Mr Zepho Ndlovu a general manager represented Transnet at the event and she sets out the other attendees. Do you know Mr Zepho Ndlovu?

MR GAMA: Yes.

10 **ADV MYBURGH SC:** What was his position?

MR GAMA: I think he was one of the three people that we had said last time that he could have been involved. He was a general manager at the Transnet port terminal.

ADV MYBURGH SC: General manager.

MR GAMA: Yes.

ADV MYBURGH SC: At Transnet port terminal.

MR GAMA: Yes.

ADV MYBURGH SC: And then what we have also managed to find is the delegation of authority that you see at page
20 250.444, do you see that?

MR GAMA: Yes but it is irrelevant for our purposes is it not.

ADV MYBURGH SC: No it is not.

MR GAMA: Why?

ADV MYBURGH SC: Because there is no delegation of

authority covering 20 June.

MR GAMA: Sorry.

ADV MYBURGH SC: This is the delegation of authority there is not a delegation of authority covering the 20th of June.

MR GAMA: There would have been a delegated authority between the 15th of June to the 21st of June.

ADV MYBURGH SC: That would...

MR GAMA: This is a different matter. It falls outside the
10 dates that we are dealing with and therefore it is irrelevant for our discussion.

ADV MYBURGH SC: Alright. Well I just want to put to you Mr Gama that we have not been able to find a delegation of authority. I have specifically asked the investigators they specifically asked Transnet this is the delegation of authority that we have been provided with.

MR GAMA: Yes but it is for the wrong period Mr Myburgh that is all I am saying.

ADV MYBURGH SC: Okay well let us then deal with this.
20 There was a delegation of authority from 27 June to 12 July, is that correct as per page 444?

MR GAMA: I do not know what is the relevance of this?

ADV MYBURGH SC: Mr Gama was there a – does page 444 reflect a delegation of authority during the period 27 June to 12 July?

MR GAMA: Yes.

ADV MYBURGH SC: And that was signed by you on the 14th of June.

MR GAMA: Yes.

ADV MYBURGH SC: So what were you doing during the period 27 June to 12 July?

MR GAMA: You have not given me an opportunity to go and check that. Did you ask me to check that? I have not.

ADV MYBURGH SC: Or is this when you were in Russia?

10 **MR GAMA:** Sorry – no I was in Russia between the 15th of June and the 21st of June.

ADV MYBURGH SC: And then after that?

MR GAMA: In St Petersburg and then I came back to the country.

ADV MYBURGH SC: Alright. And then I just wanted to show you we will have to investigate that further – here is the program which has been found at 445 and 446. And you see at 446 there you are reflected as a speaker.

MR GAMA: Yes.

20 **ADV MYBURGH SC:** So is it your case then that Mr Zepho Ndlovu was appointed – you gave him the delegated authority of the acting Group Chief Executive on – for the pair 20 June – is that case.

MR GAMA: No it is not.

ADV MYBURGH SC: So who was – who was the acting

Group Chief Executive on the 20th June?

MR GAMA: I asked Mr Karl Socikwa who was the CEO of (inaudible).

ADV MYBURGH SC: I beg your pardon.

MR GAMA: I asked Mr Karl Socikwa who was the CEO of the Transnet port terminal.

CHAIRPERSON: To act in your position.

MR GAMA: To act in my position and to represent me at this.

10 **CHAIRPERSON:** At the – at this function.

MR GAMA: Yes. He was unable to do so he requested Mr Ndlovu he gave him the speech that would have been made there and Mr Ndlovu made the speech at this place. And that speech was made on the 20th of June 2015.

ADV MYBURGH SC: And then the last two documents 250.447 – 448 this we thank – we received from you if I can start at 448. You see on the 15th of February 2018 you wrote presumably to the Oberio Hotel and you said

20 “I stayed at your hotel in Dubai from the evening of 22 January to 24 January Bill No so and so has been replaced – has been misplaced and I request a copy of the receipt. I stayed in room 1601.”

And then if you go to 447 at the bottom of the page. They responded and presumably they provided you then with the

document. Is that correct.

MR GAMA: Yes.

ADV MYBURGH SC: And that is the document at page 250.341.

MR GAMA: 250.450.

ADV MYBURGH SC: 250.341.

MR GAMA: Okay I thought they have just attached the document at the back of this thing here.

ADV MYBURGH SC: I beg your pardon I did not see that.

10 **MR GAMA:** Is it not easier to ...

ADV MYBURGH SC: I am with you. Alright it is the – well it is the same document that we have at 250.341.

MR GAMA: Yes.

ADV MYBURGH SC: Of course it does not reflect who paid this.

MR GAMA: Sorry let us – this 250.

ADV MYBURGH SC: 250.341. Mr Gama.

MR GAMA: 250.341. I think it is the same document.

ADV MYBURGH SC: Yes it is.

20 **MR GAMA:** At 250.450. Mr Myburgh yesterday you – you said you wanted to ascertain that it came it from the hotel.

ADV MYBURGH SC: No I ..

MR GAMA: It says that the balance in this thing is nil.

ADV MYBURGH SC: Yes.

MR GAMA: And you – you said that is not what you are –

you are contesting – you are contesting the fact that you are agreeing that it came from the hotel so I have given you the emails.

ADV MYBURGH SC: Yes absolutely. No I appreciate that. The point is it does not reflect who paid the bill. It is a simple point.

ADV OLDWAGE: Chair this is – this is ridiculous. It really is ridiculous in the extreme and I must object to what is being put here.

10 Firstly let us consider where this document came from. There is no signature appended to this document by virtue of when it was created. Surely Mr Myburgh must understand that that is the answer to this ridiculous proposition that he is putting.

 Secondly these accounts do not reflect who actually made the payment. So you cannot put that proposition with the greatest of respect.

ADV MYBURGH SC: But that is the very proposition I am putting.

20 **CHAIRPERSON:** My Myburgh there is ...

ADV MYBURGH SC: That is precisely the proposition that I am putting.

CHAIRPERSON: Yes.

ADV MYBURGH SC: That it does not tell you who has paid and it is not ridiculous.

CHAIRPERSON: Yes.

ADV MYBURGH SC: Because there at least two documents that show that at least the month and two months after Mr Gama stayed a schedule was being sent to Sahara saying the amount is still outstanding. So it is oh more than possible that Sahara then settled it and you get a nil balance. It is a simple proposition.

CHAIRPERSON: Yes.

ADV MYBURGH SC: It does not tell you who paid.

10 **MR GAMA:** Ja.

ADV OLDWAGE: Mr Chair this is – Mr Myburgh is not getting my objection. He is missing the point with respect.

CHAIRPERSON: Okay what is your objection?

ADV OLDWAGE: I am saying simply this.

CHAIRPERSON: Ja.

ADV OLDWAGE: He has accepted that this emanated from the hotel. That was...

ADV MYBURGH SC: Absolutely.

20 **ADV OLDWAGE:** That was his submission last night. In the ordinary course a document like this would not indicate that. That is the first issue.

CHAIRPERSON: Would not indicate what?

ADV OLDWAGE: Who – in fact if you have regard to when this document was created. On Mr Myburgh's own submission it would not reflect who had made this payment

but no invoice issued by a hotel reflects who actually made the payment because there is no provision for it.

CHAIRPERSON: But it is the position not that we saw another one that showed – or was it an email that showed that was it Sahara or somebody who had paid?

ADV OLDWAGE: No Mr Chair.

CHAIRPERSON: What – what – there was something that referred to either Sahara or somebody connected with the Gupta's that we dealt with last time.

10 **ADV OLDWAGE:** Yes.

CHAIRPERSON: Either an email or the invoice I cannot remember which one.

ADV OLDWAGE: No there was a schedule that was forwarded to the as I understood it the CEO of Sahara Computers and that was calling for payment of three hotel bills by three individuals. So that is something different. But there is something more concerning about this. This commission has wide ranging powers. I find it strange that it is not put to Mr Gama that the hotel is in fact confirmed that
20 he has not paid this bill because it is clear what Mr Myburgh is driving at here. That Mr Gama is not being truthful about payment of this account.

CHAIRPERSON: Well he has not said so. He has not said so.

ADV OLDWAGE: He is driving at Mr Chair with respect.

CHAIRPERSON: Well let us see if and when he gets there. But later on you – you may re-examine to clarify whatever issues might not have been clarified. Okay. Mr Myburgh.

ADV MYBURGH SC: Alright thank you. That brings us to the end of those documents. I want to just take you to...

MR GAMA: Sorry can I just say to you that that document it has a date on it. The date is on the date that I checked out. It says on the 24th of January 2016 paid. There is the amount and it says the balance in AED nil. That is what that
10 document says.

ADV MYBURGH SC: Mr Gama I want to take you to one or two other issues. Could I ask you please to turn to Bundle BB4(f) one of the investigators picked it out. Quite a difficult – have you got it? BB4(f). Do you have it Mr Gama?

MR GAMA: Ja.

ADV MYBURGH SC: Could I ask you please to turn page 87. It relates to the role that you played in relation to the 1064 locomotives and particularly in relation to the tender evaluation process. This is a – a memorandum to the board
20 of directors from Mr Molefe dated the 17th of January subject Request for approval to negotiate and award business to the shortlisted tenderers for the supply of the 599 Coco New Voltage locomotives for general freight business. The purpose of the memo is to provide an update to the board of directors on the tender evaluation process. Note and

approve the tender evaluation process from step 1 up to step 6 to the Transnet board of directors. Approve the recommendation of the shortlist tenderers as a result of the tender and evaluation process for negotiations and award of business and delegate all powers etcetera. I just want to confirm that you were a signatory to this document. You were part of the recommending team that you see at page 95. Would you confirm that?

MR GAMA: Ja I see this document for the first time now but
10 yes that is my signature.

ADV MYBURGH SC: Ja well it arises from evidence that you have given about your role. That in – that relates to the 599 locomotives. You will see at page 100 a similar memorandum in relation to the 465 diesel locomotives. Your signature appears at page 108. You confirm that?

MR GAMA: Yes.

ADV MYBURGH SC: Then I want to end with something that you asked me. You said that if I was of the view that you knew of this corruption and money laundering then I should
20 put it you. Remember saying that?

MR GAMA: Yes.

ADV MYBURGH SC: So I think it is important Mr Gama that I perhaps explain this. That different to normal court proceedings evidence leaders do not have a client who has a particular version. Our client is the general public. So we do

not have a particular version ultimately it will be for the Chairperson to assess all of the evidence and determine whether you may or may not have known. Now I just want to discuss a few things in that regard with you.

As I understand it is your evidence that you were completely unaware of this if money flows certainly is to be believed what is corruption and money laundering. Is my understanding of your evidence correct?

MR GAMA: Yes.

- 10 **ADV MYBURGH SC:** Oppose something ultimately that the Chairperson would have to consider is how could you have been unaware of this when it was done on such a grand scale? It spanned many years as we have seen. It went through various different phases. It involved numerous contracts. How could you have been unaware? Did you not have an inkling that something was untoward?

MR GAMA: No I did not.

ADV MYBURGH SC: Not an inkling?

MR GAMA: I did not. Not at all.

- 20 **ADV MYBURGH SC:** So...

MR GAMA: As we sit here we sit here with the benefit of hindsight where people say how could so many have not known because one was not involved in it. One was just working doing their work not knowing that there is anything in the background.

ADV MYBURGH SC: But Mr Gama you have seen literally at every turn – in fact every contract that we have discussed over the space of the last few days is tainted with corruption and money laundering.

MR GAMA: Ja that is what the money flow teams as you say have found out. I have said to you earlier that my own sense with a lot of these was that the processes themselves were followed properly inside the NDT but that our contractor had commission agreements with third parties and something that
10 we ourselves probably could not have been able to police or we did not understand and we did not know anything about it. That is what I have said.

ADV MYBURGH SC: The other thing I just want to ask your comment on I suppose another thing that would have to be considered carefully by the commission is Mr Essa on the money flows analysis and investigation we know has been dubbed as the Gupta Money laundering Lieutenant and you have seen that at least on the face of it he is behind almost all of these contracts that we have been discussing and
20 issues we have been discussing. Suppose a potential challenge is that Mr Essa was well-known to you. He was also well-known to other senior members of Transnet. It is not that this is someone who it is not like an intellect scam that you dealing with an unidentified person. This is Mr Essa you have seen him in meetings with Regiments. You have

seen him in Mr Singh's office. You have been taken by him to Gupta's. You have met with him in Dubai and so it goes on and on.

MR GAMA: No it does not go and on and on. It is somebody that I have met three or four times which I have told this commission. I did not know any other thing that he does other than what he said he does. I have not had any relationship of any sort or nature with him. I do not know what it is and I am not familiar with all of these money flows
10 and the money laundering and all of that aspects of him. He has not shared, it was not what we discussed. And you would also see that entities that he was involved in, when certain things happened that I believe imputed the integrity of Transnet, they terminated those contracts. Not once. I have told you about terminating the Regiments' contract in 2016 and the Trillian's contract in 2016.

And when Nkonki issue arose, I also terminated that contract. So I do not think that those are the actions of something who was in any way, form in cahoots with the
20 so-called Mr Essa.

ADV MYBURGH SC: And another thing, I suppose, that would have to be considered is that in order to pull off grand scale corruption and money laundering, literally, of mega-proportions, one would need some sort of insight and insistence, presumably. One would need some people

within Transnet to be on your side.

MR GAMA: And that was not me.

ADV MYBURGH SC: And then presumable if there was internal assistance, there would need to be some sort of quid pro quo. What is your comment on that?

MR GAMA: Yes, it was not me. I was not involved in that.

ADV MYBURGH SC: I suppose that then brings us to the evidence of your driver and ...[intervenes]

MR GAMA: Yes, what about the evidence of my driver?

10 **ADV MYBURGH SC:** Well, we have been through that.

MR GAMA: Yes, I have indicated to you about the driver, that sometimes he uses real events that took place and then he puts flavour into it and then he alleges that certain things that did not happen, he says that is what happened. I have dealt with those issues. I have shown you where he supposes I could have been at two places at the same time. So... And I have also shown the Chair that there are other motives in as far as the driver is concerned. I have indicated those issues and I have shared it very freely with
20 the Chairperson.

ADV MYBURGH SC: And, I mean, as you know your predecessor, Mr Molefe, has also been here implicated to a greater or lesser degree his Chief Financial Officer, Mr Singh, has been implicated. Mr Peter too has been implicated. We will hear from him next week. It is

evidence of drivers in relation to them as well.

MR GAMA: Ja, I can only talk about myself. I cannot talk about other people. It is me that I talk about. It is me that I know. I cannot talk for other people.

ADV MYBURGH SC: And then perhaps, let me just finally put to you. We have been talking now about your peers, your colleagues, some of your subordinates. But going up a level, you may have heard the evidence of Ms Gigaba in relation – the relationship between Mr Gigaba and the
10 Guptas.

You may have heard that, and of course we are still to hear from Mr Gigaba, and her evidence is still to be tested but if I was to summarise. Her evidence is to the effect that Mr Gigaba well and truly captured by the Guptas.

That he was told that if you do not do as we say, and this is when he was the Minister of the DPE, his portfolio included Transnet, then you will be send back to Home Affairs. There is evidence against him by her of him
20 also receiving cash, even at that level, Mr Gama.

MR GAMA: You would have to put those things to Mr Gigaba himself and find out the truthfulness or otherwise of those issues with him.

ADV MYBURGH SC: That completes our questioning. There is just one last thing I need to do.

CHAIRPERSON: Ja.

ADV MYBURGH SC: Mr Gama, could I ask you, please, to go back to your Exhibit 28? Previously, I have taken you through your first affidavit and you said you had nothing to add to that. Your second affidavit, you will find at page 116. And then there is an introduction and then the first thing that you deal with is the Barbara Hogan statement at page 123. I think we have gone through that or you have dealt with that in the context of the first part of my
10 examination of you relating to your reinstatement. Do you agree with that?

MR GAMA: Yes.

ADV MYBURGH SC: And just let me make it clear that these affidavits must be stand as read and they will, obviously, be considered by the Commission but I just want to make sure that there is – there may not be anything that you need to or want to add. Then what you do at para – sorry, at page 133 is you deal with Mr Molefe.

Certainly in your opening statement you dealt
20 with much of this stuff and a lot of what he had to say was of quite a general nature. But in the context of your response to him, for example, at page 144. We have dealt with what you had to say about the hundred locomotives. Another example at page 146 at paragraphs or at your paragraph 33.

We have dealt with relocation which spans a number of pages. And then at 154 you respond to T-Systems, what he has to say about that. That we have dealt with. You deal at paragraph 35 with three separate civil claims. I do not think this is something that you have dealt with. You want to say something about that?

MR GAMA: [No audible reply]

ADV MYBURGH SC: Or can we take it as read?

MR GAMA: Yes, it is something I shared ...[intervenes]

10 **ADV MYBURGH SC**: Yes.

MR GAMA: ...with the Commission, yes. You can take it as read.

ADV MYBURGH SC: And then at page 159, you deal with Mosidi's statement and we have gone through that in some detail previously. If you go to page 165, you deal with Gonsalves' statement. That we have gone through. And then at 166, you deal with Witness 2. We have dealt with that. So is there anything in this affidavit that you feel you would like to address?

20 **ADV OLDWAGE**: Mr Chair, I think in fairness to Mr Gama. He must be given an opportunity to consider. He should not be under pressure now to make that determination. There is the issue of re-examination which I will address you on in a moment when I have that opportunity but he will consider his position and as advised to your response

by way of either an affidavit or the re-examination...

[Speaker's voice drops – unclear]

CHAIRPERSON: No, no he is not being put under pressure. All Mr Myburgh is saying is. When he said he had reached the end of his questions, he could have said that is it but he just thought just in case there is something that he missed and Mr Gama might wish to say something. And obviously, if Mr Gama says: At the moment I cannot think of anything we have left out in terms of re-
10 examination or arrangements for affidavits. That can always be dealt with. So Mr Gama, if there is ...[intervenes]

MR GAMA: It will be difficult.

ADV MYBURGH SC: Sorry?

MR GAMA: I am saying it will be difficult for me, just going through this in lightning speed.

CHAIRPERSON: Ja. No, no ...[intervenes]

MR GAMA: ...anything has been omitted or not.

CHAIRPERSON: No, no that is why Mr Myburgh was just
20 trying to make sure that in case he has missed out something if you remember something, you can deal with it. But there is the opportunity to clarify something when your counsel re-examines you ...[intervenes]

ADV MYBURGH SC: Yes.

CHAIRPERSON: ...or in terms of arrangements that will

be made to file an affidavit.

ADV MYBURGH SC: Okay. So in relation to your third affidavit, that deals with Mohamedi and Callard and we have traversed much of that already. If your counsel has something he wants to put to you in addition to evidence that you have given, of course, he can do that. And then your fourth affidavit, which you will find at page 250.262, that deals with Witness 2 and something that we have gone through in its entirety.

10 **MR GAMA:** Yes.

ADV MYBURGH SC: Thank you, Chairperson. That concludes our examination of Mr Gama.

CHAIRPERSON: Okay thank you. Counsel for Mr Gama, is there an arrangement that has been reached subject to my approval or what is the position in terms of clarifying anything, re-examination?

ADV OLDWAGE: Mr Chair, there certainly will be a need for Mr Gama to place additional evidence before the Commission. There is no formal agreement.

20 **CHAIRPERSON:** Ja.

ADV OLDWAGE: But we wish to take advantage of your offer.

CHAIRPERSON: Ja.

ADV OLDWAGE: That we reduce to writing in a form an affidavit that which in the ordinary course ...[intervenes]

CHAIRPERSON: Ja.

ADV OLDWAGE: ...constitutes re-examination.

CHAIRPERSON: Yes.

ADV OLDWAGE: I have taken those instructions.

CHAIRPERSON: Yes.

ADV OLDWAGE: We will be doing so.

CHAIRPERSON: Okay.

ADV OLDWAGE: So we are simply making use of that invitation by you for us to submit such an affidavit in view
10 of re-examination.

CHAIRPERSON: Ja.

ADV OLDWAGE: Thank you.

CHAIRPERSON: Okay no that is fine. Mr Myburgh, you have ...[intervenes]

ADV MYBURGH SC: Yes, and I suppose you setting out a timeline would be important ...[intervenes]

CHAIRPERSON: Yes, that will put in action, ja. Do you want to give an idea of what you have in mind in terms of timeframe, because it is better if we have a timeframe.

20 **ADV OLDWAGE:** [No audible reply]

CHAIRPERSON: Seven days?

ADV OLDWAGE: Mr Chair, would – bearing in mind that we would like to consult the transcripts of the proceedings and the evidence of other witnesses that have been referred to during my client's questioning, might I suggest

the 4th of June?

CHAIRPERSON: That is about how long? How long from now? Today is what?

ADV MYBURGH SC: That is three weeks.

CHAIRPERSON: That is three weeks. I think that is too long but I would be prepared to give you more than seven days, as I was indicating. I am prepared to give you up to on or before 25 May. Is that fine?

ADV OLDWAGE: To comply with that? Regrettable, I am
10 away and I am in other matters and I am also away from Johannesburg. So the 25th, which is – it gives us six working days, Mr Chair.

CHAIRPERSON: H'm.

ADV OLDWAGE: If I might then ask?

CHAIRPERSON: But ...[intervenes]

ADV OLDWAGE: But I am not testing your patience.

CHAIRPERSON: Yes.

ADV OLDWAGE: But I also have a busy schedule.

CHAIRPERSON: Yes, but of course ...[intervenes]

20 **ADV OLDWAGE:** Or that we do it by the 28th.

CHAIRPERSON: 28th?

ADV OLDWAGE: It gives us to extra days.

CHAIRPERSON: Okay no that is alright then. The deadline is 28 then.

ADV OLDWAGE: Thank you, Mr Chair.

CHAIRPERSON: Okay alright. Thank you Mr Gama for your cooperation. Thank you for – to your legal team. Thank you Mr Myburgh and your team. Thank you to the investigators. Thank you to the technicians and the staff. Thank you to everybody for all your cooperation to enable us to work until this time. We will adjourn now.

For the benefit of the public. Tomorrow I will be hearing the evidence of Mosebenzi Zwane in relation to Eskom, former Minister of Mineral Resources.

10 We adjourn.

INQUIRY ADJOURNS TO 13 MAY 2021